

VERBATIM ¹RECORD OF TRIAL ²

(and accompanying papers)

of

MANNING, Bradley E.

(Name: Last, First, Middle Initial)

[REDACTED]

(Social Security Number)

PFC/E-3

(Rank)

Headquarters and

Headquarters Company,

United States Army Garrison

(Unit/Command Name)

U.S. Army

(Branch of Service)

Fort Myer, VA 22211

(Station or Ship)

By

GENERALCOURT-MARTIAL

Convened by

Commander

(Title of Convening Authority)

UNITED STATES ARMY MILITARY DISTRICT OF WASHINGTON

(Unit/Command of Convening Authority)

Tried at

Fort Meade, MD

(Place or Places of Trial)

on

see below

(Date or Dates of Trial)

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¹ Insert "verbatim" or "summarized" as appropriate. (This form will be used by the Army and Navy for verbatim records of trial only.)

² See inside back cover for instructions as to preparation and arrangement.

1 CDC[MR.COOMBS]: There is a second copy, yes, Your Honor; I can
2 provide that to the Court right now.

3 MJ: Okay. Thank you. Make sure the appellate exhibits stay
4 together.

5 All right. Is there anything else we need to address on
6 this issue?

7 TC[MAJ FEIN]: Your Honor, just to clarify, at the very end, you
8 asked the defense, as far as the closure decision, of whether
9 they're--the defense is asking the Court to also consider it for
10 trial as well, or just in pretrial motion?

11 MJ: No, there's two issues that we have with respect to the
12 M.R.E. 404(b) issue: the closure, whether we're going to close the
13 court or not, and then the actual discussion of whether it's
14 admissible under M.R.E. 404(b) or not.

15 TC[MAJ FEIN]: Yes, Your Honor.

16 MJ: And I was asking the defense if they wanted me to consider
17 the CD on both of those issues.

18 TC[MAJ FEIN]: Got it, Your Honor. Thank you. No further
19 issues.

20 MJ: All right. Are we ready to discuss the computer-generated
21 records? That was actually a classified prosecution motion with a
22 redaction, is that correct?

23 ATC[CPT OVERGAARD]: Yes, ma'am.

1 MJ: What is the--my--you understand--the classified exhibit is
2 number 278, is that correct?

3 ATC[CPT OVERGAARD]: 278, yes, ma'am, and then the unclass,
4 redacted version is 246.

5 MJ: And the defense response is 247, is that correct?

6 ATC[CPT OVERGAARD]: Yes, ma'am.

7 MJ: All right. Go ahead. So----

8 ATC[CPT OVERGAARD]: Ma'am, the government is seeking to pre-
9 admit the open source center user information files for the accounts
10 "bmanning" and "bradass87," the OSD logs for both accounts, the
11 Intel-Link logs for IP addresses that we refer to as ".22" and ".40"
12 which were the accused's primary SIPR computers, and the accused's
13 Intel-Link passport account information.

14 MJ: So, are they all--are they what's listed in the redacted
15 motion as enclosures one through nine? Is that what you're trying to
16 admit? All of it?

17 ATC[CPT OVERGAARD]: They are enclosures five through nine,
18 ma'am.

19 MJ: Five through nine?

20 ATC[CPT OVERGAARD]: Yes, ma'am.

21 MJ: So, not one through four?

1 ATC[CPT OVERGAARD]: No, one through four, ma'am, are just
2 evidentiary support for the government's factual portion of the
3 motion.

4 MJ: So, just to make sure I'm understanding, there, you want to
5 introduce to the OSC User Information files, "bmannning" with
6 attestation?

7 ATC[CPT OVERGAARD]: Yes, ma'am.

8 MJ: You want to see User Information files "bradass87" with
9 attestation?

10 ATC[CPT OVERGAARD]: Yes, ma'am.

11 MJ: The OSC logs "bmaanning" and "bradass87" with attestation?

12 ATC[CPT OVERGAARD]: Yes, ma'am.

13 MJ: Intel-Link ".22" and ".40" logs with attestation?

14 ATC[CPT OVERGAARD]: Yes, ma'am.

15 MJ: And Intel-Link passport account information with
16 attestation, is that correct?

17 ATC[CPT OVERGAARD]: Yes, ma'am. And the government seeks to---

18 -

19 MJ: Now, the logs, themselves, enclosures five through nine,
20 where are they?

21 ATC[CPT OVERGAARD]: They are in the safe, ma'am.

22 MJ: So, enclosures five to nine, as listed in the redacted
23 version--the enclosures, themselves, are classified, is that correct?

1 ATC[CPT OVERGAARD]: The--actually, not all of them are
2 classified, ma'am. Enclosures five and six are unclassified, but
3 they are actually in the safe with the classified exhibits, just to
4 keep them all in one place, ma'am. Seven is confidential and then
5 eight and nine are Secret/NOFORN--Confidential/NOFORN.

6 MJ: You said five and six are unclassified?

7 ATC[CPT OVERGAARD]: Yes, ma'am. Seven is Confidential/NOFORN
8 and then eight and nine are Secret/NOFORN.

9 MJ: All right. Let's do this: before we proceed, let's take a
10 brief recess. I'm going to ask the court security officer to secure
11 the unclassified logs so that we can bring them out and I will have
12 them as--well, I assume--is there some, here, in the classified
13 exhibits or is it--where is the original?

14 ATC[CPT OVERGAARD]: In the safe, ma'am.

15 MJ: Okay. Why don't we go ahead and do this: let's take a
16 brief recess? If you could retrieve the unclassified, actual
17 enclosures, themselves, and we'll go ahead and have those when we
18 consider the motion.

19 ATC[CPT OVERGAARD]: Yes, ma'am.

20 MJ: Court is in recess until that's done.

21 **[The Article 39(a) session recessed at 1649, 28 August 2012.]**
22 **[The Article 39(a) session was called to order at 1658, 28 August**
23 **2012.]**

1 MJ: This Article 39(a) session is called to order. Let the
2 record reflect all parties present when the Court last recessed are
3 again present in court. All right, I believe--Counsel, have you
4 provided the enclosures?

5 ATC[CPT OVERGAARD]: Yes, ma'am.

6 MJ: Oh, that's what you gave me--was the originals? I thought
7 that was my working copy? Let the record reflect I'm talking to the
8 court security officer. All right. This is enclosures five and six;
9 they can go with the prosecution motion as attachments. I understand
10 you want to keep the attachments together?

11 ATC[CPT OVERGAARD]: Yes, ma'am.

12 MJ: To the extent we have a motion that addresses classified
13 attachments and unclassified attachments, take the unclassified
14 attachments and keep them with the motion.

15 ATC[CPT OVERGAARD]: Yes, ma'am.

16 MJ: It'll affect how their filed later on, whether they're
17 under seal or not under seal. All right. Proceed.

18 ATC[CPT OVERGAARD]: Ma'am, the government's moving to pre-admit
19 these because they are relevant, not excludable as hearsay, and
20 authentic as business records with attestations sworn under 902(11).
21 The OSC user accounts that you have are--show that the accused--that
22 the accounts actually belonged to the accused--the "bradass87" and
23 the "bmanning" accounts--and those connect the accused to those

1 usernames through his SIPR email addresses that are listed on there
2 and they establish the dates of access of the accused to those
3 accounts. And the Intel-Link passport account also lists the
4 accused's email address as well as questions and answers that contain
5 personal information for password access and that account ties the
6 accused to various other accounts that were used with--on the SIPRNET
7 computer, ma'am.

8 MJ: All right. So, talk to me about these records.

9 ATC[CPT OVERGAARD]: Yes, ma'am.

10 MJ: Who maintains them?

11 ATC[CPT OVERGAARD]: The OSC files, ma'am, are maintained by the
12 CIA. And the Intel-Link files are maintained by the NSA.

13 MJ: Okay, and how are they maintained? And why are they
14 maintained?

15 ATC[CPT OVERGAARD]: They are maintained as--the OSC files,
16 ma'am, they log user information, date, time of access, and what the
17 user did while he was on the Open Source Center website and all those
18 logs tie back to the username--the individual that was actually
19 conducting the activity.

20 MJ: All right. Let's go through enclosure by enclosure, here.

21 We have enclosure--well, you're starting off on enclosure
22 five. What do enclosures one through four do for me?

1 ATC[CPT OVERGAARD]: Ma'am, one through four are what the
2 prosecution used in order to make the factual assertions it made
3 throughout the motion.

4 MJ: All right.

5 ATC[CPT OVERGAARD]: So, they're just evidence; forensic
6 reports.

7 MJ: So, number five, and six and seven are all maintained by
8 this same entity, is that correct? I believe you told me the CIA?

9 ATC[CPT OVERGAARD]: Yes, ma'am, five, six, and seven are all
10 CIA records--or maintained by the CIA.

11 MJ: Okay. So, tell me about their records and how they
12 maintain them and what the--how are they generated--how are they
13 collected, how are they maintained.

14 ATC[CPT OVERGAARD]: How the computer collects them, ma'am?

15 MJ: All right. So, someone is on a computer----

16 ATC[CPT OVERGAARD]: Ma'am, the records are--when a user enters-
17 -or when a user creates an account, that record--or that information
18 is saved in a database and then, in order to pull up that, I guess,
19 screenshot or record of the individual, somebody has to go in and
20 type in a query.

21 MJ: All right. In this particular case for enclosure five?

22 ATC[CPT OVERGAARD]: That would be--the query would be for
23 "bmanning" and then for enclosure six it would be for "bradass87."

1 MJ: And what happens after that query is entered?

2 ATC[CPT OVERGAARD]: Then the individual who created the
3 screenshot--took a screenshot of that query.

4 MJ: What do you mean by "took a screenshot"?

5 ATC[CPT OVERGAARD]: The government doesn't know how, exactly,
6 the records custodian took the screenshot, ma'am. We could determine
7 that information and get back to the Court, but, typically, it's just
8 how you take a screenshot normally.

9 MJ: So, are they spitting something out of a computer, or what
10 are they doing?

11 ATC[CPT OVERGAARD]: They're drawing up information that's in a
12 database and then they're printing it out, ma'am.

13 MJ: Okay. So, they do a query and then something appears?

14 ATC[CPT OVERGAARD]: Yes, Your Honor.

15 MJ: And they print it?

16 ATC[CPT OVERGAARD]: Yes, ma'am.

17 MJ: Okay.

18 ATC[CPT OVERGAARD]: And that's the same with the OSC logs,
19 ma'am; they enter in the user ID and then it produces the relevant
20 log files and then they print that.

21 MJ: They print that and then they certify that they are the
22 records custodian?

1 ATC[CPT OVERGAARD]: In this case, ma'am, they put it on a disc,
2 yes.

3 MJ: Okay. What about numbers six, seven, eight, and nine?

4 ATC[CPT OVERGAARD]: That was seven for the logs, ma'am, and
5 then eight is similar; they went in and queried for the IP addresses,
6 ".22" and ".40," they pulled up those records, and they put them on a
7 disc.

8 MJ: Okay. And how were those records maintained? Before the
9 query, you said the NSA, apparently, has this Intel-Link?

10 ATC[CPT OVERGAARD]: Yes, ma'am.

11 MJ: Okay. And how does that get maintained?

12 ATC[CPT OVERGAARD]: It is the--the Intel-Link--they record the
13 communications between the IP addresses and the servers, so it would
14 be capturing the information from those Intel-Link servers, ma'am.

15 MJ: Okay. So, what kind of a query would occur and what came
16 out?

17 ATC[CPT OVERGAARD]: The queries would be--the queries were just
18 for the IP--the specific IP addresses, ma'am. So, they were for--
19 they were very specific on their attestation. They were for the
20 SIPRNET IP address ending in ".22" as well as the SIPRNET IP address
21 ending in ".40."

22 MJ: Okay.

1 ATC[CPT OVERGAARD]: And then they also pulled the Intel-Link
2 passport account information for "bradley.e.manning" and they put
3 that on a disc as well. And that was similar to the OSC logs; it's
4 maintained in a database, they type in a query, it's pulled up, and
5 they print it.

6 So they are all computer-generated records, ma'am, that
7 these individuals have pulled up and just attested to the
8 authenticity of the how they're maintained and that that's consistent
9 with what they have listed as--under the 902(11) that the military
10 uses.

11 MJ: All right. I believe the challenge to you is going to be
12 that those--the queries by the custodian of the records are
13 statements.

14 ATC[CPT OVERGAARD]: Yes, ma'am, and the government would argue
15 that, when specifically looking at *Blazier*, it notes that "computer
16 generated records involve so little intervention by humans in their
17 generation as to leave no doubt that they are totally--are wholly
18 machines integrated for practical purposes." So, in these instances,
19 the individuals that are attesting to the authenticity of the records
20 aren't stating that PFC Manning used his--that they saw PFC Manning
21 using his ".22" or that PFC Manning did, in fact, use his ".22" IP
22 address to search for Julian Assange on Intel-Link, they're just
23 stating that these records are what they purport to be. These are

1 the records maintained on these databases, these are the ".22"
2 records that were pulled and they were maintained in the normal
3 course of business. They're not actually making statements about
4 what the records say, ma'am. It's similar to--making these queries
5 is similar to, you know, having a clerk go to a file cabinet and pull
6 out the file; I mean, that's all this is but it's in digital means.
7 And--I mean, typically, we see this in toll records, with phones, and
8 with specific individuals and bank records and in all of those cases,
9 the same thing, ma'am, you have to at least, you know, limit it
10 somehow otherwise we would just be printing endlessly or, you know,
11 accessing all this irrelevant information unless it was limited in
12 some way and this is very little human intervention that goes into
13 actually limiting these.

14 MJ: What's the difference between and the line of cases that
15 holds if you go in and you say there's a no records-search, that
16 that's testimony?

17 ATC[CPT OVERGAARD]: There's a no records-search, ma'am? Well,
18 that's an individual testifying as to what they actually witnessed.
19 That individual is going in and saying that "I did this search, I saw
20 this, and this is what the result was."

21 MJ: All right.

22 ATC[CPT OVERGAARD]: Unlike this case where they're just pulling
23 the records based on the queries and saying that they were maintained

1 in the normal course of business. It's very different from, you
2 know, what *Blazier* discusses as the statements that are testimonial
3 hearsay which are people--individuals, in those case, lab
4 technicians, going and stating the tests that they ran, what the
5 results were, what they meant, and, basically, hand-writing out the
6 statement that they would give before the Court.

7 MJ: All right. Thank you. Captain Toomey?

8 ADC[CPT TOOMAN]: Your Honor----

9 MJ: Tooman, excuse me.

10 ADC[CPT TOOMAN]: Sorry?

11 MJ: I said "Toomey," I meant Captain "Tooman." I'm sorry.

12 ADC[CPT TOOMAN]: Thank you, ma'am. Your Honor, the defense
13 position is that these records are testimonial hearsay. And, as the
14 government pointed out, the query from the *Blazier* Court is talking a
15 lot about human intervention--how much human intervention is there
16 and the defense's position is that, in--with these records, there's
17 lots of human intervention. You have human intervention from the
18 user, whoever it is. These records contain statements. If----

19 MJ: Let me stop you there. So, CIA is maintaining records.
20 The user is in there doing whatever they're doing and all of this is
21 being maintained on a machine somewhere. All of this is prior to any
22 inquiry.

23 ADC[CPT TOOMAN]: Yes, Your Honor.

1 MJ: So, how is that different than any other business record?

2 ADC[CPT TOOMAN]: Well, what I'm saying, Your Honor, is that

3 that's a statement by the user. This isn't totally--the *Blazier*

4 Court looks at, "Is this wholly computer-generated?" And if you look

5 at a urinalysis case, you have specimen that goes into a computer and

6 all this stuff is spit out; here are the results. This is--that's

7 the data.

8 MJ: Okay. I see what you're talking about. All right.

9 ADC[CPT TOOMAN]: Okay, so that's what the *Blazier* Court means

10 by "wholly computer-generated." There is very little human

11 interaction; they put the sample in, we get the result. Here, you

12 have a user who is making statements, searching for whatever they're

13 doing, doing whatever they're doing, and then, on the other end, you

14 have this--I don't want to call them a custodian of the records

15 because I don't believe that these are records----

16 MJ: Why wouldn't they be records?

17 ADC[CPT TOOMAN]: Well, Your Honor, it's a record that's created

18 after the fact. And, as Your Honor pointed out, you have this person

19 who is typing in a query and that's a statement.

20 MJ: Well, what's the difference between that and opening a file

21 cabinet and pulling out a lease?

22 ADC[CPT TOOMAN]: Well, Your Honor, the difference is, again,

23 with the *Rankin* Court, the defense talked about, last time we

1 addressed this issue, why are we going to pull this stuff out? Here,
2 we have prosecutorial inquiry, we have----

3 MJ: Okay, police call the owner of a landlord--or a
4 landlord/tenant company. "Go pull me the lease of such and such."
5 Would that be, normally, a non-testimonial business record?

6 ADC[CPT TOOMAN]: Yes, Your Honor.

7 MJ: See, that's where I'm confused. What's the difference?

8 ADC[CPT TOOMAN]: Well, here, the difference is, Your Honor,
9 the--again, this record doesn't exist, but for this investigation.

10 MJ: So, it's the query that the defense is arguing is the
11 statement?

12 ADC[CPT TOOMAN]: Exactly, Your Honor.

13 MJ: The testimonial statement?

14 ADC[CPT TOOMAN]: Yes, Your Honor.

15 MJ: Okay.

16 ADC[CPT TOOMAN]: If you look at, in particular, a couple of
17 those exhibits, you have these time periods where there are gaps and
18 we would direct you to eight and nine. If you look at those
19 attestation certificates, you'll see that there are time periods and
20 there are gaps and that suggests that this is even more narrowly
21 tailored by whoever is pulling up these records saying--sort of
22 supporting the idea that there's a prosecutorial intent here; we're
23 trying to create evidence and I would link that to the *Harcrow* Court

1 that the defense cites. In the *Harcrow* Court, you have--police go
2 in, they conduct a search, they pull out drug paraphernalia, and then
3 they send it off to a lab to have a search done--or to have forensics
4 and analysis done and we think that's the most analogous case,
5 presently. Here, we have these sort of computer forensic files that
6 are out there, but for this investigation, we wouldn't be looking at
7 them. And so, it's clear, from everyone involved--for everyone
8 involved, that the only reason we're creating these reports is
9 because we have a prosecutorial intent; we think that there's
10 evidence, here, of some crime.

11 MJ: Isn't that how you get any kind of a business record? You
12 think that there's a fraudulent lease in a BAH case, I'm getting the
13 lease, I'm getting the receipts.

14 ADC[CPT TOOMAN]: Yes, Your Honor, but those receipts they
15 already--they're already--they already exist.

16 MJ: So it's the snapshot of the record--it's the compilation
17 from the--the machine spits out based on the query that----

18 ADC[CPT TOOMAN]: Right, Your Honor.

19 MJ: ----the defense is arguing is testimonial?

20 ADC[CPT TOOMAN]: Right. Exactly. And, subject to your
21 questions--and I guess the only other point would be we would request
22 that you defer ruling on this until there's some sort of showing of
23 relevance on the merits that would make this even relevant.

1 MJ: Okay. So, that's a separate objection?
2 ADC[CPT TOOMAN]: Yes, Your Honor.
3 MJ: Okay.
4 ADC[CPT TOOMAN]: Subject to your questions.
5 MJ: I think I just asked them. Thank you.
6 ADC[CPT TOOMAN]: Thank you, Your Honor.
7 MJ: Anything else from the government?
8 ATC[CPT OVERGAARD]: No, ma'am.
9 MJ: Anything else we need to address today?
10 CDC[MR.COOMBS]: No, Your Honor.
11 TC[MAJ FEIN]: No, Your Honor.
12 MJ: All right. So, the same time frame tomorrow, then? We'll
13 go on the record at 10 o'clock. We've got--my records indicate we've
14 got the 404(b) issues, the judicial notice issue from both the
15 government and the defense tomorrow morning?
16 TC[MAJ FEIN]: Yes, ma'am.
17 MJ: And that, I believe, is it, and then we're going to take a
18 recess to do some things the parties need to do independently of the
19 Court and to look at the case calendar in light of what's occurred
20 today and what we've talked about. And the government will provide
21 404(b) notice if there's any--what they're going to do with the
22 additional potential piece that you're going to put in to the defense
23 and to the Court, is that correct?

1 ATC[CPT OVERGAARD]: Yes, ma'am.

2 MJ: Is there anything I've missed that's going on tomorrow?

3 CDC[MR.COOMBS]: No, ma'am.

4 TC[MAJ FEIN]: No, Your Honor.

5 CDC[MR.COOMBS]: With regards to the 404(b), obviously, we just

6 would ask that the government provide that notice in time tonight;

7 any time tonight is fine and then we could respond accordingly.

8 MJ: And does "tonight" mean up until 11:59?

9 CDC[MR.COOMBS]: It does, ma'am; I'll be up.

10 MJ: All right. That's fine. Court is in recess.

11 [The Article 39(a) session recessed at 1704, 28 August 2012.]

12 [END OF PAGE]

1 [The Article 39(a) session was called to order at 1014, 29 August
2 2012.]

3 MJ: This Article 39(a) session is called to order. Let the
4 record reflect all parties present when the Court last recessed are
5 again present in court.

6 I'd like to go over a few things that have occurred since
7 we recessed the Court yesterday. The government has provided the
8 emails, the 700 emails approximately at issue for in camera review
9 and the government also advised that there are some of those emails
10 are not actually legible. Would you like to describe that for the
11 record?

12 TC[MAJ FEIN]: Yes, Your Honor, some of the emails are either
13 encrypted or have certificates on the email or embedded in the emails
14 and when they print unfortunately the certificates themselves print
15 out between 10 to 100 pages and although we provided the Court
16 everything we received including the print-outs of that. We are
17 looking through them again to show the defense an example and then we
18 will probably go back through and delete that out. So, it will
19 condense the overall amount of the emails.

20 MJ: All right. Defense, do you have any objection to that
21 procedure? The government going and combing through emails that are
22 gobble gook?

1 CDC[MR. COOMBS]: No objection to that, Your Honor, just as long
2 as obviously the context of the 700 emails is retained. So if the
3 email is encrypted that the print-out eventually does give the
4 content of the email.

5 MJ: Let me make sure I understand. So, if the government pulls
6 out the -- do you object to the government pulling out the encrypted
7 information but leaving the substance of the email, that's what I've
8 asked them to do.

9 CDC[MR. COOMBS]: Right. No, what I would object to, ma'am, or
10 just some assurances that the encrypted aspect that -- of the email
11 is actually at least printed from the standpoint of let's say the
12 email has three sentences in it that are all encrypted. If they pull
13 out the encryption is the Court getting that three sentences of the
14 email? So, just the substance of the emails, as long as that still
15 gets to the Court we have no objection. So, if by printing the
16 encryption algorithm or whatnot you get 50 pages, yeah, we don't have
17 an objection to that being removed. Just the as long as the Court
18 still gets the email.

19 MJ: Do you want to make sure that there is no one hidden page
20 in there that's got an email in it in the encryption?

21 CDC[MR. COOMBS]: Exactly, Your Honor.

22 TC[MAJ FEIN]: And to clarify for the record, Your Honor, as Mr.
23 Coombs just kind of explained it's the metadata that would not be

1 provided that prints out. The gobble gook is metadata. The
2 substance would still be present.

3 MJ: Okay. So, when you go through and you comb -- right now
4 it's all there?

5 TC[MAJ FEIN]: Yes, Your Honor.

6 MJ: So, the government -- what I'm understanding the
7 government's proposing is going through and removing the metadata?

8 TC[MAJ FEIN]: That's correct, Your Honor, the printed metadata
9 for these certificates that are in -- yes, Your Honor.

10 MJ: And those are all in the discs that the ----

11 TC[MAJ FEIN]: Yes, Your Honor.

12 MJ: ---- are here on the record?

13 TC[MAJ FEIN]: Yes, Your Honor.

14 MJ: Okay. And that will be done such so that there are no
15 hidden emails or messages in the metadata that would be mistakenly
16 removed?

17 TC[MAJ FEIN]: Yes, Your Honor.

18 MJ: Okay.

19 TC[MAJ FEIN]: It would be done page-by-page.

20 MJ: And just to make sure I understand if there is an email on
21 the top of the page would the metadata follow it?

22 TC[MAJ FEIN]: Yes, Your Honor.

1 MJ: So, would there be any emails within, say there are 10
2 pages of metadata following an email, would there be any further
3 substance in those 10 pages?

4 TC[MAJ FEIN]: It is our understanding, Your Honor, by looking
5 at it this morning again that no, it's -- the substance of the email
6 starts and then it is the 1s, 0s, Ls, and everything else that
7 follows that's not readable and then it goes to the next email. The
8 only reason I'm clarifying is because when you have a stack of emails
9 that's why we are going to have to go through page-by-page because it
10 will go right to the next email and then you could have substance.
11 So, by page-by-page we'll make sure that the substance remains and
12 it's the metadata that is pulled.

13 MJ: And will you be doing that through -- with the copies in my
14 office?

15 TC[MAJ FEIN]: Yes, Your Honor.

16 MJ: Okay. Anything else?

17 TC[MAJ FEIN]: Your Honor, also just for the record those -- the
18 three stacks as directed by the Court were marked and the CDs we are
19 still maintaining to give to the court reporters but it's Appellate
20 Exhibit 279, is the original 84 emails that the government disclosed.
21 Appellate Exhibit 280 which will be the emails disclosed to the
22 defense in the beginning of this week and then the final Appellate

1 Exhibit 281 are those that pursuant to the Court's order under R.C.M.
2 701(g), are being provided to the Court pending a review.

3 MJ: All right. Thank you. Anything else on that issue?

4 CDC[MR. COOMBS]: No, Your Honor.

5 TC[MAJ FEIN]: No, Your Honor.

6 MJ: The government also sent me an email last night advising
7 that the government will not be offering anything additional under
8 Military Rule of Evidence 404(b) today, is that -- other than what
9 was originally notified to the defense.

10 Is that correct?

11 TC[MAJ FEIN]: Yes, Your Honor.

12 MJ: Okay. And the defense also tried to send the government
13 and the Court an email with a proposed revised court schedule based
14 on the Article 13 emails and issues that arose yesterday. There is -
15 - The Court -- The government and the Court and the defense have had
16 email challenges a little bit throughout this trial and we're having
17 them again. So, I didn't get that email and neither did the
18 government. Major Fein, do you want to state for the record what's
19 going on?

20 TC[MAJ FEIN]: Yes, Your Honor, after being notified this
21 morning by the defense with hard copies of the print outs the
22 government has reached out to the appropriate information technology
23 experts to try to get this issue resolved. Apparently it is an on-

1 going issue not just focused on emails originating from Mr. Coombs
2 law office, there are others that have been added to the trouble
3 ticket and prioritized because this is an issue we need to get
4 resolved immediately.

5 CDC[MR. COOMBS]: And, Your Honor, just an additional fact my
6 co-counsel, Major Hurley did receive the email. He's on a separate
7 email server, OSD, so it is a DISA issue as opposed to anything else.

8 MJ: All right and I did see the email traffic between Major
9 Fein and the automation personnel that have been helping us resolve
10 these issues.

11 TC[MAJ FEIN]: Yes, Your Honor, as of this morning.

12 MJ: The Court is prepared to rule on the prosecution motion to
13 admit evidence. The government moves to pre-admit the following
14 evidence enclosed to Appellate Exhibit 278:

15 Enclosure 5: OSC User Information Files (bmanning) with
16 attestation;

17 Enclosure 6: OSC User Information Files (bradass87) with
18 attestation;

19 Enclosure 7: OSC Logs (bmanning and bradass87) with
20 attestation;

21 Enclosure 8: Intelink .22 and .40 Logs with attestation;

22 Enclosure 9: Intelink Passport Account Information with
23 attestation.

1 One, the government proffers that the above evidence is
2 admissible as machine generated data and as properly authenticated
3 business records.

4 Two, the defense objects on the ground that the keystroke
5 searches by the custodian of the record are testimonial statements
6 and the resulting data are records of searches and are also
7 testimonial statements.

8 Findings of fact:

9 1. The data in Enclosures 5, 6, and 7 were maintained by
10 the CIA in electronically searchable databases for business purposes.
11 The data in Enclosures 8 and 9 were maintained by the NSA in
12 electronically searchable databases for business purposes.

13 2. The data was collected prior to or contemporaneous with
14 the dates of the charged offenses and was maintained by the entity
15 for business purposes before the query for information by law
16 enforcement.

17 The law:

18 1. The Sixth Amendment precludes testimonial hearsay from
19 coming into evidence against the accused without cross-examination of
20 the declarant unless: One, the declarant is unavailable and two, the
21 declarant was subject to prior cross-examination. *United States v.*
22 *Sweeney*, 70 M.J. 296 Court of Appeals for the Armed Forces 2011.

2. A statement is testimonial if made under circumstances which would lead an objective witness reasonably to believe the statement would be available for use at a later trial. A document created solely for an evidentiary purpose made in aid of a police investigation is testimonial. While formalized certifications of results in lab reports are testimonial, machine generated data and printouts are not statements and, thus, they are not hearsay. *Sweeney*, 70 M.J. at 301; *United States v. Foerster*, 65 M.J. 120 Court of Appeals for the Armed Forces 2011, affidavit filled out by victim of check fraud pursuant to internal bank procedures admissible as non-testimonial business record even if later turned over to law enforcement.

Conclusions of law:

1. The fact that information maintained on a business related database is pulled from that database as a result of a typed-in search query by the records custodian at the request of a law enforcement query does not transform machine generated data into a testimonial statement. It is the nature of the underlying data at issue not the form of the query, the fields of the query, or who made the query that determines whether the information is machine generated, a statement, or a testimonial statement.

2. Unlike the cover memorandum and results certification that were held to be testimonial statements in *Sweeney*, the machine

1 generated data offered for admission by the Government in this case
2 contains no additional representations or certificates that were not
3 machine generated.

4 Three, the records offered for admission by the Government
5 are machine generated and not statements. They are properly
6 authenticated. If the Government offers evidence to show their
7 relevance, the exhibits are admissible.

8 So ordered this 29th day of August 2012. And that would be
9 at Appellate Exhibit 282.

10 Now, following that ruling what the Court will address this
11 morning is the Government's motion to admit evidence under Military
12 Rule of Evidence 404(b) and then that will be followed by both
13 parties' motions to -- for the Court to take judicial notice.

14 Now, yesterday, the defense -- a part of the defense motion
15 was a motion to close the Court due to pretrial publicity. The Court
16 is prepared to rule on that part of the motion at this time. The
17 Government moves to make a preliminary determination on the
18 admissibility of three crimes, wrongs, or acts under Military Rule of
19 Evidence 404(b) and on the use of such evidence to rebut the offer of
20 a pertinent character trait under Military Rule of Evidence 404(a).
21 The evidence the Government seeks to admit is:

22 One, M.R.E. 404(b), Act I. On 28 June 2012, Sergeant First
23 Class Bryan Madrid observed postings by the accused on YouTube using

1 buzz words such as Top Secret, Secret, Classified, and SCIF against
2 his training. As corrective training SFC Madrid required the accused
3 to give a presentation to the platoon at formation, present a
4 PowerPoint presentation to Sergeant First Class Madrid and to prepare
5 a written product. The accused's presentation to the platoon
6 discussed information security, proper handling of information, a
7 Soldier's responsibility to protect and not expose classified
8 material. The possibility that a Soldier's disclosure that he or she
9 had access to classified material may be dangerous to the Soldier and
10 that enemy forces are trying to collect the information on US
11 Military. The accused's written product and PowerPoint presentation
12 defines Secret information and identified the type of people who try
13 to collect information for use against the United States such as
14 foreign governments, enemy spies, and hackers, etcetera.

15 Second, his M.R.E. 404(b) Act II.

16 And third, his M.R.E. 404(b) Act III.

17 The defense moves to close the Court during the Article
18 39(a) sessions of the Court during which evidence is introduced,
19 argument is made and the Court's ruling is announced with respect to
20 Government's M.R.E. 404(b) motion regarding M.R.E. 404(b) Acts II and
21 III above because this case has received and continues to receive
22 media attention and public airing of the facts giving rise to this
23 motion will impact PFC Manning's ability to receive a fair trial and

1 there is no alternative to closure that will protect against that
2 harm.

3 The law:

4 The First Amendment protects the public's right to an open
5 trial.

6 The Sixth Amendment protects the accused's right to a
7 public trial.

8 Both Constitutional amendments and Rule for Courts-Martial
9 806 provide that courts-martial shall be open to the public unless:

10 1. There is a substantial probability that an overriding
11 interest will be prejudiced if the proceedings remain open.

12 2. Closure is no broader than necessary to protect the
13 overriding interest.

14 3. Reasonable alternatives to closure were considered but
15 found to be inadequate; and,

16 4. The military judge makes case specific findings on the
17 record justifying closure, *United States v. Hershey*, 20 M.J. 433,
18 Court of Military Appeals, 1985. *ABC Inc. v. Powell*, 47 M.J. 363 at
19 365, Court of Military Appeals, 1997.

20 5. The trial court must consider alternatives to closure
21 even if not offered by the parties. Trial courts must take every
22 reasonable effort to accommodate public attendance in criminal
23 trials, *Presley v. Georgia*, 558 U.S. 209, at 210.

1 Conclusions of law:

2 1. The Court takes judicial notice there has been
3 consistent and extensive media coverage in this case.

4 2. The defense has demonstrated that preventing the fact
5 finder from pretrial bias, from pretrial publicity of the underlying
6 facts of uncharged conduct by the accused as offered by the
7 government in M.R.E. 404(b), Acts II and III is an overriding
8 interest likely to be prejudiced if the proceedings remain open.

9 3. Closure of the Article 39(a) session during which the
10 Government's M.R.E. 404(b) motion is litigated for M.R.E. 404(b),
11 Acts II and III, is more broad than necessary to protect that
12 interest. There are reasonable alternatives to closing the
13 proceedings.

14 4. Identification of M.R.E. 404(b), Acts II and III, is
15 all that is necessary during oral argument to litigate this motion.

16 Thus the ruling of the Court is: The Court shall remain
17 open during the litigation and of the Government's M.R.E. 404(b)
18 motion. The parties will reference M.R.E. 404 (b), Acts II and III.

19 CDC[MR. COOMBS]: Your Honor, at the beginning when you refer to
20 Act I?

21 MJ: Yes.

22 CDC[MR. COOMBS]: You indicated the day was in June of 2012.

23 MJ: I stand back, I believe that was June of 2000 ----

1 CDC[MR. COOMBS]: 2008.

2 MJ: Thank you very much. All right, the Court will fix that
3 typo and we'll substitute a copy for Appellate Exhibit 283. And Mr.
4 Coombs, thank you very much.

5 CDC[MR. COOMBS]: Yes, ma'am.

6 MJ: All right. Would the parties like to address M.R.E.
7 404(b), Act I? Let's do them in order. We'll do Act I first.

8 CDC[MR. COOMBS]: Certainly, Ma'am, yes, we do like to address
9 that.

10 MJ: Go ahead.

11 CDC[MR. COOMBS]: Ma'am, would you like us to begin or would you
12 rather the Government start?

13 MJ: Actually the government may start.

14 ATC[CPT OVERGAARD]: Ma'am, may the Government address all three
15 Acts in its argument?

16 MJ: That's fine. That's fine.

17 ATC[CPT OVERGAARD]: Ma'am, in general character evidence is not
18 allowed at trial; however, the Government is asking that the Court
19 determine the admissibility of these three other crimes, wrongs or
20 acts committed by the accused that are discussed in the filings that
21 are not being used to show his character but they are being used to
22 show knowledge, state of mind and for other propensity reasons.
23 Importantly, ma'am, the misconduct or other acts of the accused does

1 not need to fall into the specific category as matriculated in M.R.E.
2 404(b) but merely needs to be offered for some other purpose and to
3 demonstrate the accused's predisposition of the crime. *United States*
4 *v. Reynolds* is the Court of Military Appeal's case that lays out the
5 three-prong test that C.A.A.F. uses to determine admissibility of the
6 facts under 404(b) which looks at whether the evidence supports a
7 finding by the fact finder that the accused committed the other act,
8 what fact of consequences made more or less probable by the existence
9 of the evidence and does the probative value substantially outweigh
10 the danger bomb of fair prejudice.

11 MJ: Okay. Captain Overgaard, I'm getting old. I need to hear
12 a little louder.

13 ATC[CPT OVERGAARD]: Oh, I apologize, ma'am. The Government will
14 just briefly go through the three acts of misconduct and discuss
15 defenses' objections under the *Reynolds* factors, ma'am, and the
16 Government's response to those objections.

17 Now, you just went through, the AIT misconduct and stated
18 the facts that both the defense and government stipulated to in
19 regard to the AIT misconduct. The evidence -- as to factor one of
20 the *Reynolds* test the evidence does reasonably support a finding that
21 the accused committed the other act. The testimony of Sergeant First
22 Class Madrid at the Article 32 which the government enclosed supports
23 that as well as testimony at trial of other AIT classmates will

1 support that, and then finally the PowerPoint on the accused's
2 external hard drive which is also attached as an enclosure to the
3 Government's motion and the defense concedes this prong as well,
4 ma'am.

5 MJ: Just to narrow the issue ----

6 ATC[CPT OVERGAARD]: Yes, ma'am.

7 MJ: ---- as I understand it and Mr. Coombs correct me if I'm
8 wrong, the defense isn't objecting to the -- what was the PowerPoint
9 slide and presentation made to the formation. Is that correct?

10 CDC[MR. COOMBS]: Objecting in what sense, ma'am?

11 MJ: As I understand the defense brief and again tell me if I'm
12 wrong, the defense is objecting to the posting of the YouTube, not
13 the corrective training that went on afterwards. Is that correct?

14 CDC[MR. COOMBS]: Yes, ma'am, we are focused on the 404(b)
15 evidence that -- that -- the admissibility of the PowerPoint
16 slideshow and all that we don't -- we don't contest with this motion.
17 It's the posting of the YouTube video that the government has alleged
18 in other crime or wrong acts under 404(b). Does that -- Does that
19 answer ----

20 MJ: Oh, I think the Government is alleging the entire thing is
21 a 404(b), the corrective training and the posting of the YouTube. Am
22 I wrong Captain Overgaard?

1 ATC[CPT OVERGAARD]: Well, the posting of -- the posting of the
2 video was the 404(b) evidence, ma'am, and the resulting corrective
3 training the government would contend is admissible, not under 404(b)
4 but the 404(b) would give context to what -- why the corrective
5 training ----

6 MJ: That's another act too, right?

7 ATC[CPT OVERGAARD]: What's that, ma'am?

8 MJ: The corrective training is another act too isn't it?

9 ATC[CPT OVERGAARD]: It's -- It is an act, yes, ma'am.

10 MJ: Okay. So -- so -- Well, in any event the defense isn't
11 objecting to that piece of it, right?

12 CDC[MR. COOMBS]: Right, ma'am. Our only ----

13 MJ: So, the focus is on the posting?

14 CDC[MR. COOMBS]: Yes, ma'am.

15 MJ: Okay. Go ahead and proceed.

16 ATC[CPT OVERGAARD]: But the defense is objecting just not to the
17 PowerPoint, is that what I'm assuming?

18 CDC[MR. COOMBS]: Well, ma'am ----

19 ATC[CPT OVERGAARD]: The government's understanding was that the
20 defense was objecting to the entire thing under the second and third
21 factors of the Reynolds analysis in their response.

22 MJ: I guess I'm confused. I've got the defense talking about
23 the YouTube video.

1 CDC[MR. COOMBS]: Yes, ma'am.

2 MJ: Is that the only thing you are objecting to or are you
3 objecting to the entire thing?

4 CDC[MR. COOMBS]: No, ma'am, we're -- our focus is the YouTube
5 video. As far as the defense is concerned the act of the statement -
6 - the pretrial statement of the accused that is to, we are not
7 conceding its admissibility, we're focused on the posting of the
8 YouTube video and -- and whether or not the trier of fact should be
9 allowed to consider that.

10 MJ: All right. Where I'm looking here is the portion of the
11 defense motion that says, "Assuming the second prong is satisfied,
12 evidence of the YouTube prong fails the third prong because its
13 probative value is substantially outweighed by the danger of unfair
14 prejudice. In this case the wrong of the uploading of the video to
15 YouTube with buzzwords has little probative value. The true
16 probative value lies in the actions by PFC Manning after the
17 corrective training was administered by Mr. Boudridge; EG: Preparing a
18 presentation for his fellow students about the information security.
19 The government is free to put on evidence of the class given by PFC
20 Manning without reference to the wrong." I'm just trying to -- I'm
21 just trying to understand what the defense is objecting to. If they
22 are objecting to the entire piece or just the posting of the YouTube
23 video but not the class to the formation.

1 CDC[MR. COOMBS]: Ma'am, we are objecting to -- let me make it
2 clear then and I apologize for the confusion that's caused by this.
3 We are objecting to both. It's the position of the defense that the
4 YouTube wrong shouldn't come in and that without that information at
5 this point the corrective training done by PFC Manning is now not
6 relevant. It is not at this point relevant.

7 MJ: Okay. So, Captain Overgaard, I'm sorry to interrupt you.
8 They are objecting to the whole thing. Okay?

9 ATC[CPT OVERGAARD]: Yes, ma'am. Thank you for the
10 clarification.

11 So, factor -- So, moving onto factor two of the Reynolds
12 test, ma'am, the government will address everything. There are facts
13 of consequence made more probable by the existence of the evidence.
14 The evidence shows the accused has knowledge that information posted
15 on the Internet is accessible to and sought out by the enemy. This
16 information supports the elements of the charged offenses. It's
17 evidence that the accused had reason to believe that the information
18 could be used to the injury of the U.S. or to the advantage of any
19 foreign nation in support of the 793 charges. It's also evidence
20 that the accused had knowledge that Intelligence published on the
21 Internet is, in fact, accessible to the enemy, which supports Charge
22 II, Specification 1.

1 Now, defense has contended in their response that the
2 accused did not have the requisite knowledge when he committed the
3 wrong and did not gain that knowledge, the fact of consequence until
4 he received and completed the corrective training. Therefore, there
5 is a causation issue with the accused's knowledge. However, the
6 defense has actually stipulated to the facts that AIT began in April
7 2008 with the first block of instruction on INFOSEC which teaches the
8 Military Analyst how to handle and safeguard classified information
9 and operational security including the enemy's use of the Internet.
10 The defense also stipulated to the accused's corrective training
11 which occurred in June of 2008 after the training on INFOSEC. And
12 specifically the accused's PowerPoint was dated 13 June 2008.

13 And second, Your Honor, even if the accused did not have
14 the requisite knowledge at the time of the offense which the
15 government is not acknowledging the accused certainly had it burnt
16 into his memory as a result of three forms of corrective training.
17 The fact that the accused received the corrective training as a
18 response to the wrong he committed makes it more likely he will
19 remember that training. The government does not agree with defense's
20 contention that the accused had to have the same knowledge at the
21 time of the wrong as he did at the time of the charged misconduct.
22 However, the evidence shows that the accused did know his actions
23 were wrong when he actually committed them.

1 Your Honor, the defense has also contended under factor
2 three of the *Reynolds* test that the probative value does not -- or
3 the probative value does not outweigh the dangers of unfair
4 prejudice. That the government -- No, I apologize, Your Honor. That
5 the probative value does not substantially outweigh the danger of
6 unfair prejudice. As discussed there is strong proof of the
7 misconduct and it is probative to the elements concerning the
8 accused's knowledge when the compromised that information. The
9 information is not unfairly prejudicial; it's used to prove
10 knowledge. It's not used to be -- cause the fact finder to make a
11 decision based on any inappropriate reason. The fact that the
12 accused received the training as a reminder at the -- received the
13 corrective training increases the likelihood that the accused learned
14 and will remember the material. It also establishes why the
15 PowerPoint which will likely be used as evidence in trial was
16 created. Without the misconduct -- the 404(b) misconduct and the
17 corrective training the panel or the trier of fact does not get the
18 whole picture.

19 First, since the accused was contemplating -- or was
20 completing the training as result of the wrong the material will be
21 much more significant and memorable to the accused as individuals
22 tend to learn from their mistakes the best.

1 And, second, the redundancy of the information is also
2 significant. The accused learned the information in his AIT classes,
3 committed the wrong, and then learned the information again by
4 completing the three different types of corrective training. We see
5 the reasons emphasized why the accused will remember the information
6 clearly even if it was about a year and a half later.

7 Now, as to Act II, Your Honor, factor one: The evidence
8 again does reasonably support a finding that the accused committed
9 the other act. Defense had contended that there is not enough
10 evidence that the act was done and that a record of the act was only
11 made after Act III and the current charged misconduct. And also the
12 defense has contended that the individual relevant to the act cannot
13 say what motivated the accused to commit the act.

14 Your Honor, there was testimony attached to the
15 government's brief from the Article 32 and from a sworn statement
16 that supports Act II; and the government contends that this is enough
17 evidence. The individual gave these statements under oath. A panel
18 could reasonably find that the conditional fact by a preponderance of
19 the evidence which is what is required for factor one of the *Reynolds*
20 test, ma'am. And the individual does not need -- The defense has
21 also contended that the individual cannot say what motivated the
22 accused to commit the act but the individual does not need to

1 speculate as to what motivated the accused to commit the act. The
2 trier of fact can make that determination if necessary.

3 As to factor two, ma'am, there are facts of consequence
4 made more probable by the existence of the evidence. The defense has
5 contended that the attempts -- the intents in the act in the charged
6 misconduct are not sufficiently similar but the evidence reflects the
7 accused's state of mind and the intent for the charged misconduct.
8 Specifically the act supports Charge I of Specification 1, which as
9 circumstantial evidence that the accused knowingly gave Intelligence
10 to the enemy. They are not the same intent but they are evidence --
11 the act is evidence -- the intent behind the act is evidence of the
12 intent for that as well.

13 In addition, Charge II of Specification 1, that the accused
14 wrongfully and wontedly caused information to be published on the
15 Internet with knowledge that it would be accessible to the enemy.
16 The intent behind the two acts is sufficiently similar in these two
17 instances as well, ma'am. In addition, Charge II and all of the 793
18 specifications the conduct was willful and the accused had reason to
19 believe that the conduct could be used to the injury of the United
20 States. In addition, Charge II, the 641 specifications the accused
21 did steal, prolong, or knowingly convert a thing of value to the U.S.
22 The intents, the government would proffer again, are sufficiently
23 similar in these cases.

1 As to factor three, ma'am, the defense has contended that,
2 they are not temporarily proximate and if the situation in which the
3 act occurred makes the act less probative; however, and that's
4 discussed through strong proof that the misconduct did occur and the
5 government would contend that the situation in which the act occurred
6 actually makes it even more probative and that the statement was
7 temporarily proximate because it happened in the months leading up to
8 the deployment.

9 And for Act III, ma'am, factor one, the evidence does
10 reasonably, again, support a finding of fact by the fact finder that
11 the accused committed the other act. The defense has not contested
12 this factor and it was supported by several witnesses.

13 For factor two, the defense has contended that the
14 government's preferred reason of a timeline is not effective
15 consequence; however, the government contends that the times are
16 certainly facts of consequence as the dates of the misconduct are
17 elements of the charges and it paints a complete picture of why the
18 accused's situation changed and what the accused did as a result.

19 MJ: Why does the fact finder have to know why the situation
20 changed? Don't they only have to know that it did change?

21 ATC[CPT OVERGAARD]: Without knowing that the -- Without knowing
22 all the factors involved such as the, such as the accused was removed
23 from the SCIF, that he had his security clearance revoked, that he no

1 longer had access to classified information, and then he was moved to
2 a different place and then immediately began accessing and stealing
3 the unclassified information, the government contends that without
4 understanding all those factors which obviously lent toward there is
5 some sort of misconduct committed that the panel, that the fact
6 finder won't have a full understanding. It might be confusing what
7 caused all of that. And there was also a mental health evaluation
8 involved at that time, ma'am. And in addition to -- in addition to
9 offering a timeline the government would contend that the instance
10 could also be used to show the accused's state of mind, reaction to
11 stress at the time and -- and I guess, act of expressing that
12 reaction.

13 The government -- or the defense has also contended that
14 there's scant probative value that there's a lot of potential
15 prejudice and recommends eliciting the testimony from Staff Sergeant
16 Bigelow, the supply room, staff sergeant, that the accused was just
17 assigned to work for him in the supply room. But again, Your Honor,
18 if the government does not know all those factors he's removed --
19 removed from the SCIF, had his security clearance suspended, and then
20 could only access unclassified information which he did access and
21 steal, it does not tell -- it does not paint the complete picture of
22 what happened.

1 In conclusion, Your Honor, the defense will also have ample
2 opportunity at trial through cross-examination and argument to attack
3 the meaning, importance, and weight of the evidence, and there should
4 also be, obviously, a limiting instruction to discuss the permissible
5 uses of the evidence at trial. And just briefly, ma'am, the
6 404(a)(1) portion of the government's brief, the government also
7 sought a and seeks a determination on whether the same three acts and
8 wrongs can be used to rebut a good Soldier defense if offered by the
9 defense and again, in general, character evidence is not allowed at
10 trial. However, if evidence of a pertinent character trait is
11 offered by the accused, the prosecution can rebut that evidence. And
12 good Soldier evidence is an extremely common defense and all acts
13 argued could go to rebut that defense. And defense has contended in
14 their motion that it's too speculative and too early to rule;
15 however, the government proffers that it's not speculative, it's
16 contingent and now is a good time to decide the issue because it
17 provides predictability to both sides and if defense is not going to
18 offer a good Soldier evidence then it has no impact; but if the
19 defense is going to offer the good Soldier evidence and it is decided
20 then both parties can plan accordingly. Subject to your questions,
21 ma'am.

22 MJ: All right. I think I'm all set. Thank you. Major Hurley?

1 ADC[MAJ HURLEY]: Ma'am. Ma'am, before I begin, do you have any
2 questions of me based on the talk that we had before or anything you
3 heard?

4 MJ: No, I think I understand. I might have just been confused
5 by just a phrase in your written pleading but just make sure I'm
6 clear, you are objecting to the entire posting as well as anything
7 following to include the PowerPoint slides to the formation?

8 ADC[MAJ HURLEY]: Yes, ma'am. All right. And let's just talk
9 about -- Let's begin with that one. Certainly as we indicated in the
10 motion we agree that the appropriate factual basis under the first
11 prong of *Reynolds* test is satisfied. It's the second problem that --
12 or it's the second prong, pardon me, that the defense contends is not
13 satisfied. And what -- From the defense's perspective if the Court
14 will allow a colloquium the government is trying to straddle two
15 horses with predictable results. The first horse they are trying to
16 straddle is knowledge that this information is relevant to the
17 knowledge of the accused. Now, it was interesting in the
18 presentation of the government counsel in this case as she stood
19 before you didn't talk about cases. And one case that we would like
20 to refer you to generally would be *Huddleston v. the United States*.
21 In that case, a very short Supreme Court opinion, similar case when
22 it comes to other crimes, wrongs or acts and one indeed that is cited
23 by the government in its brief it is a not -- a guilty knowledge case

1 and the language that I use in my brief, ma'am, when I talk about the
2 accused's guilty knowledge through the arc of another situation and
3 how that guilty knowledge over there is relevant to his guilty
4 knowledge here. That's not -- That's not clear from the facts as
5 we've -- as we've discussed and have been identified for PFC Manning.
6 *Huddleston*, *Huddleston* was alleged to have stolen a bunch of
7 television sets along with other items and it was his guilty
8 knowledge with respect to the television sets that the government
9 sought to admit in his prosecution for stealing these other things.
10 That is the sort of situation, his guilty knowledge, the knowledge of
11 where the televisions were and matters like that, his guilty
12 knowledge with respect to that other instance is what's relevant
13 here. That's not PFC Manning's situation. In PFC Manning's
14 situation he posted a video to YouTube. It comes to the attention of
15 his AIT instructor. When his AIT instructor says, take that video
16 down and here's the corrective training task that I'm going to give
17 you associated with fixing this problem. That's where, from the
18 defense's perspective the guilty knowledge, or the -- pardon me, the
19 knowledge comes from, that administration of the corrective training.
20 Unlike *Huddleston* where it's a -- the maintaining of a guilty
21 knowledge throughout another act that can be inferred to *Huddleston*
22 in the current facts at bar. So, that's the first problem.

1 The second problem is something that the government did
2 discuss in its argument before the Court and that is the government's
3 timeline and exigencies of proving the government's case are not a
4 fact of consequence. Is there some proposition of law that stands
5 for that idea? What the government suggests to the Court in its
6 pleading is *Castillo's, U.S. v. Castillo*, which is the government's -
7 - or which is a case that's cited by both and again, I would refer
8 the Court to the facts of that particular case. In that case it was
9 a case that occurred before the statute of limitations was reworked
10 on child sex assault and the government wanted to use a bunch of
11 assaultive behavior from the accused in that case, *Castillo* towards
12 his step-daughter. And C.A.A.F. in its opinion in *U.S. v. Castillo*,
13 essentially throws up its hands and says, listen, there's a lot of
14 reasons we could come up with to justify admitting this evidence
15 under 404(b). Is it intent? Is it planned? Is it a guilty
16 conscious? There are a lot of things that we could point to to say
17 this is -- this is it. But it's with respect to an accused and the
18 situation. That is the important information. It's not exigencies
19 of proving the government's case. It's a pertinent character trait
20 of the accused that's relevant in the case of *Castillo* to his intent.
21 There is -- And if the Court is aware of a proposition of law that
22 stands for this idea that exigencies of proving the government's case
23 allow 404(b) evidence to come in.

1 MJ: 404(b) evidence comes in for a variety of reasons, right,
2 so long as it is not character?

3 ADC[MAJ HURLEY]: Right, but it has to be pertinent on some
4 level to the accused and not to illustrating, in this case, a
5 timeline for the government to make sure that there is no confusion
6 on the part of the members. Now, first off, it's curiosity that may
7 spring up in the trier of fact mind when it comes to well, why was
8 the accused directed to do this corrective training? Well that
9 curiosity is not the same as confusion, would first be the position
10 of the defense. And, ma'am, before you ask your question, if you
11 have it, just so that I can finish this thought, the next reason is
12 noncommissioned officers in the United States Army task junior
13 enlisted Soldiers from time immemorial to teach a class to do hip-
14 pocket training. That happens all the time. Trier of fact that sits
15 in that panel box is well aware that that is a common technique that
16 is used and they will -- it would be hard to imagine that they would
17 think something more of that other than a noncommissioned officer
18 gave a junior enlisted Soldier a task and the task was performed
19 especially in a training environment, ma'am.

20 MJ: Now I'm confused again, and I'm going back to the original
21 question that I had. I thought initially that the defense was not
22 objecting to the PowerPoint presentation, but was objecting to

1 Sergeant First Class Madrid's -- the posting and his -- the reasons
2 why the accused is doing the corrective training.

3 ADC[MAJ HURLEY]: Right.

4 MJ: Then after our dialogue I thought that the defense was
5 objecting to the reasons why and the corrective training.

6 ADC[MAJ HURLEY]: Yes, ma'am.

7 MJ: Now, I'm confused again.

8 ADC[MAJ HURLEY]: I apologize for the confusion. It's the
9 defense's contention that first off the overt act of posting the
10 YouTube video fails 404(b).

11 MJ: Okay.

12 ADC[MAJ HURLEY]: And then after that, at this point the
13 PowerPoint presentation and the corrective training is not yet
14 relevant. So, if the government wants to seek to admit that evidence
15 or wants you to pre-admit that evidence now our objection would be
16 relevance because it is not shown, we would submit to you at this
17 point, to be relevant.

18 MJ: All right. I believe the government's argument is it's the
19 PowerPoint itself is showing knowledge that the accused knows what
20 should and shouldn't be on the Internet.

21 ADC[MAJ HURLEY]: Yes, ma'am.

22 MJ: So, is the defense objecting to the PowerPoint presentation
23 standing alone?

1 ADC[MAJ HURLEY]: Yes, ma'am.

2 MJ: Okay.

3 ADC[MAJ HURLEY]: And the -- as we indicated -- as the
4 government indicated in its argument to you we believe also that even
5 if you find a fact of consequence is proven by this that it fails the
6 third prong of the *Reynolds* test; specifically that these acts are
7 just not to proximate and that there is a substantial change in the
8 nature of the parties from this case and to the charges and
9 specifications that have been referred to this Court and that change
10 makes these situations so similar that it fails the third prong.
11 Essentially it fails 403.

12 Ma'am, moving on to the second act. It's the defense's
13 first contention that the first prong of the *Reynolds* test is not
14 satisfied. The three factors that we would point to indicate that is
15 the timing of the report of this incident, the relationship of the
16 reporter of this incident to PFC Manning, the relationship and the
17 uncorroborated nature of the report, and finally what we would argue
18 to you, ma'am, is that there is ample reason to conclude that PFC
19 Manning's motivation in the instance of the second act was a myriad
20 of other things. Was it brought on by a human reaction to what was
21 occurring, indeed perhaps an understandable human reaction to what
22 was happening to him in that moment.

1 Secondly, ma'am, we would submit that the second -- even if
2 you find the first prong is satisfied and keeping in mind that as the
3 Court is well aware that first prong is pretty low; the standard is
4 pretty low, we believe the second prong is not satisfied. What we
5 argue in our motion and indeed what we argue today is the
6 government's got to show some consistency in intent, that the intent
7 when PFC Manning's intent in Act II is similar to his intent during
8 the charges in the -- in what the government has alleged the charges
9 and specifications in this case. And the government hasn't shown --
10 brought any evidence into this Court today to say, see this intent is
11 the same. What they are doing is providing you a preview of their
12 argument. It must have been this reason, that must have been what
13 motivated him, is this, not that here is some evidence, ma'am, see,
14 here's evidence of his intent during the charged offenses and here's
15 evidence of his intent before. See how it marries up and what we
16 would again refer to are the cases cited in our brief. Specifically
17 and I can't think of the case name off the top of my head right now,
18 but the stalking case. That level of intent, it's *U.S. v. Sweeney*,
19 ma'am, 48 M.J. at 117.

20 MJ: Uh, huh.

21 ADC[MAJ HURLEY]: Allowing that other -- Seeing how that intent
22 marries up, the behavior of Sweeney in the first instance with his
23 former wife and then his behavior as the evidence is shown and proven

1 in court and what the government is just doing is, ma'am, here's our
2 argument and this fact must match up to our argument, it must.

3 MJ: So the intent in Act II the defense position is not
4 circumstantial evidence of the intent in the charged offenses?

5 ADC[MAJ HURLEY]: Yes, ma'am. Or, that's it, ma'am, and
6 furthermore, to help you come to a conclusion about the intent,
7 whatever intent you might glean from what happened in Act II. The
8 government has shown you no evidence to say, ma'am, see how it
9 marries up? See how this evidence marries up with that? That is
10 what, from the position of the defense we would believe is a failure
11 of the proponent of this evidence with respect to this 404(b)
12 evidence. Is that, that failure means that no fact of consequence is
13 now illustrative? Our second point when it comes to the second prong
14 or the second act being not satisfied is, is it's evidence that
15 you'll see in those other cases relevant to the situation that this
16 individual is in. You see in *Sweeney* that it's relevant to
17 understand his behavior. You see in *Haro* that it is relevant to
18 understand ultimately what his intent was with the charged offense.
19 You see in *Hayes* ultimately the same thing. What the information he
20 had showed you the intent, the ultimate intent of the accused in that
21 case. That's where intent is appropriate. That's when you can say
22 he shared the same mindset. The Court of Appeals for the Armed
23 Forces, Court of Military Appeals approved it with respect --

1 approved the use of 404(b) intent with respect to those particular
2 cases. In this situation there is nothing to marry that up. There
3 is nothing for the Court to rely on to marry it up. And indeed that
4 would be our perspective.

5 Another instance is when you see intent, when it is clear
6 and shown the parties are similar. The third thing that we would say
7 with respect to this evidence. The parties have substantially
8 changed. There is a distinction between who is present in Act II and
9 how according to the government PFC Manning committed the offenses
10 described in the charges and specifications. Those are very
11 dissimilar situations so that intent just is not clear in the way
12 that's been proved through the military appellate process when it
13 comes to 404(b) evidence.

14 Ma'am, the other -- if the Court finds that both the first
15 and second prong of the *Reynolds* test are satisfied with respect to
16 Act II, the defense would argue that the third prong is not
17 satisfied. Again, we would submit to you that these events are
18 temporally approximate, that they occurred months or that this
19 instance, this event in Act II occurred months before the accused's
20 deployment and that means even months before any of the offenses that
21 have been referred to this Court were dated that the timeframe was
22 dated and that finally, ma'am, that there is no evidence that has
23 been introduced in this Court that the frequency of this particular

1 act, that the government's alleged and the government's proven
2 through its enclosures not through the in-person testimony but
3 through the enclosures that this has happened. But there is no
4 frequency of it, whereas you would compare this case with those other
5 cases that I cited with respect to the intent argument. There is a
6 frequency, an ongoing nature of this evidence, the possession of
7 child pornography with respect to ----

8 MJ: Is there a requirement in case law that there be -- that
9 one act standing alone can never be a 404(b) evidence?

10 ADC[MAJ HURLEY]: Oh, no, ma'am, that's not what I'm saying.
11 I'm saying when you are considering your 403 -- essentially a 403
12 balancing test that one -- one factor is a frequency of this. So, as
13 you are weighing 403 does the probative nature, is it or is it not
14 substantially outweighed by the danger of unfair prejudice we would
15 submit to you that's another factor that makes that unfair prejudice
16 higher with the low probative value that's been offered by the
17 government with respect to this evidence that's why we believe, even
18 if you find the first two prongs of the *Reynolds* test are satisfied
19 with respect to the second act, that it still fails the third prong
20 of the *Reynolds* test.

21 Ma'am, with respect to Act III, I won't waste the
22 Court's time by indicating that the first prong is not satisfied.
23 There is ample evidence that the Court can rely on to conclude that

1 the first prong of the *Reynolds* test is satisfied with respect to Act
2 III. And again, our first problem with -- or in our argument we
3 believe that just exists period with respect to this evidence is the
4 government's timeline is not a fact of consequence that is necessary
5 for them to put this evidence on. And it's not a fact of consequence
6 that moves anything down the field. And it's not, you know, the
7 evidence of this pertinent character trait doesn't address that fact
8 of consequence. And with respect to this one, now, with respect to
9 Mr. Madrid and the AIT, they have offered another 404(b) approved
10 idea, guilty knowledge. With respect to this timeline, that's it.
11 There is no -- no other -- no other argument that the government has
12 made, well, I guess other than the one they made today which should
13 be rejected out of hand, that this is a fact of consequence or this
14 fact of consequence is important for the Court. The only one that,
15 as I indicated in my motion, the only one that I can imagine was
16 opportunity and obviously opportunity fails because it doesn't, you
17 know, there is no evidence to indicate that this Act III was done
18 with the intent of giving him an opportunity to commit the charged
19 offenses as indicated by the government.

20 Now, what the government indicated in their argument,
21 ma'am, was that this shows a certain pattern of behavior of the
22 accused and with respect to that, the defense would offer that, and
23 certainly argue, that the government had ample opportunity to charge

1 this. It's -- It -- They had an opportunity to charge this offense.
2 This offense is one that is charged and is tried in courts-martial
3 routinely and they elected not to do it. They've elected now to seek
4 refuge in 404(b) to get -- to get this evidence in to show the
5 accused's erratic behavior if I'm adequately surmising what Captain
6 Overgaard said, as well as to prove up their timeline and we would
7 submit to you that that choice that the government has made with
8 respect to this evidence they shouldn't find refuge in 404(b) on Act
9 III.

10 MJ: Well, let me ask you a question on Act III. The government
11 in their argument -- well, in your written brief you said that the
12 Court can -- that -- that the 404(b) evidence there is a less
13 prejudicial way of getting the timeline established that the accused
14 was assigned to work in the supply room because the government -- at
15 a certain date because the government can just get that -- illicit
16 that information from Staff Sergeant Bigelow.

17 ADC[MAJ HURLEY]: Yes, ma'am.

18 MJ: What about -- The government also went on into detail about
19 removal of security clearances and other such things and I didn't see
20 that as part of the 404(b) motion.

21 ADC[MAJ HURLEY]: The government's 404(b) motion?

22 MJ: Yeah.

1 ADC[MAJ HURLEY]: And it wasn't part of the government's 404(b)
2 motion as I'm aware. Ma'am, perhaps I misunderstood your question.

3 MJ: So, I guess I'm -- And so you're -- The defense's
4 contention then is that the timeline could be established through
5 Staff Sergeant Bigelow?

6 ADC[MAJ HURLEY]: Yes, ma'am.

7 MJ: There is no reason to go into any further detail, is that
8 correct?

9 ADC[MAJ HURLEY]: Yes, ma'am. The -- If I may expand on that --
10 --

11 MJ: Yes, please.

12 ADC[MAJ HURLEY]: ---- for a moment. Any Servicemember,
13 yourself, ma'am, myself, Captain Tooman, any member of the
14 prosecution team, if we wear the uniform then we can be assigned any
15 other duties. Obviously there are some restrictions on Judge
16 Advocates and their assignments, but when it comes to Soldiers, they
17 can be assigned to do anything and the members are capable of
18 understanding that at one point PFC Manning was working here, at some
19 other point he commenced work someplace else. And there are a host
20 of reasons that that might happen especially with members that are
21 used to working in a deployed environment where a Soldier might be
22 tasked to do anything for any number of reasons. And there is no
23 confusion that will result. He was here. One day I was in

1 Arlington, Virginia, the next day I was in Columbia, Maryland,
2 pursuant to an order I received from the government and I worked in
3 both places. It happens. And that there's no -- there's -- the
4 probative value that they offer for this timeline is so small and the
5 danger of unfair prejudice with respect to this evidence is so great
6 that it's the position of the defense as we put in our motion, that
7 this would cause the Court by itself to look at this closely under
8 403 and with the alternative that exists, the obvious alternative
9 that exists and with the nature of this evidence that we believe Act
10 III should be excluded for a host of -- for its failure of the second
11 prong but certainly also for its failure of the third prong of the
12 *Reynolds* test. Ma'am, do you have any other questions?

13 MJ: No, I think I've asked them all. Thank you.

14 Does the government have anything else?

15 ATC[CPT OVERGAARD]: No, ma'am.

16 MJ: Captain Overgaard, I do have a question for you.

17 ATC[CPT OVERGAARD]: Yes, ma'am.

18 MJ: The -- All of those myriad of things that you said in
19 argument about revocation of security clearances, mental health
20 evaluations, and all of that, how does that establish a timeline?

21 ATC[CPT OVERGAARD]: Ma'am, that doesn't -- that doesn't go for
22 the timeline. That was in response to defense's proposal that Staff
23 Sergeant Bigelow could just say that he was transferred to him.

1 MJ: Well, why -- Let's assume that Staff Sergeant Bigelow can
2 say that.

3 ATC[CPT OVERGAARD]: Yes, ma'am.

4 MJ: The accused was moved to the supply room, he no longer had
5 access to classified information. What matter of consequence is
6 furthered by the rest of Act III?

7 ATC[CPT OVERGAARD]: The fact that the accused actually had his
8 security clearance suspended and could not access classified
9 information would be ----

10 MJ: Why does the fact that -- Why do the members have to know
11 anything beyond the fact that he worked in the supply room and didn't
12 get access to classified information?

13 ATC[CPT OVERGAARD]: As long as the members know he couldn't have
14 access to classified information, ma'am, some alternate form of
15 advising the members of that fact could be sufficient.

16 MJ: All right. So you are looking here for the timeline then?

17 ATC[CPT OVERGAARD]: Yes, ma'am, and -- and the fact that he was
18 moved -- he was removed from the SCIF, his security clearance was
19 suspended, and that he could not get access to classified
20 information, legitimately get access to classified information.

21 MJ: All right. Thank you. Why don't we do this at this time.
22 Yes?

1 TC[MAJ FEIN]: I'm sorry, Your Honor, may we have just an in
2 place recess for just a few seconds?

3 MJ: Certainly.

4 **[The trial counsel conferred.]**

5 ATC[CPT OVERGAARD]: Ma'am, my co-counsel just reminded me of
6 another point that I made in the oral argument that wasn't in the
7 brief which was that the government could also use the accused's
8 reaction to the -- or could use the act as evidence of the amount of
9 stress that the accused was under in his reaction to that as kind of
10 a display of the sort of stress that he was actually under.

11 MJ: How is that relevant to the government's case-in-chief?

12 ATC[CPT OVERGAARD]: It's relevant because it shows knowledge
13 that ----

14 MJ: All right.

15 ATC[CPT OVERGAARD]: Or it shows that -- well it shows knowledge
16 that the accused -- or a display of what the accused's -- a physical
17 display of what the accused was doing in reaction to his misconduct,
18 if that makes sense.

19 MJ: Okay. Anything further from the defense?

20 ADC[MAJ HURLEY]: Certainly, ma'am, we would disagree with that
21 contention. If any more is needed we are happy to argue it but I
22 think the Court understands.

1 MJ: I think I have the position of the parties. At this point,
2 why don't we take a recess. Is 10 minutes sufficient?

3 TC[MAJ FEIN]: Yes, Your Honor.

4 ADC[MAJ HURLEY]: Yes, Your Honor.

5 MJ: All right. Court is in recess until 20 minutes after 11.

6 **[The Article 39(a) session recessed at 1113, 29 August 2012.]**

7 **[The Article 39(a) session was called to order at 1132, 29 August**
8 **2012.]**

9 MJ: This Article 39(a) session is called to order. Let the
10 record reflect that all parties present when the Court last recessed
11 are again present in court. For the record I am taking the Military
12 Rule of Evidence 404(b) motion under advisement. I hope to have a
13 ruling tomorrow morning.

14 Next on the agenda is the government and defense motions
15 for judicial notice of adjudicative facts. Let's begin with the
16 government. Before we start the government has moved for the Court
17 to take judicial notice of the following adjudicative facts which
18 would be ----

19 ATC[CPT MORROW]: It's Appellate Exhibit 248.

20 MJ: 248, and I've got Army Regulation 25-5, Paragraphs 1-4, 1-
21 5, 3-3, 4-5, 4-16, 4-17, and Figure B1.

1 Two, AR 380-5, Paragraphs 1-20, 1-21, 1-22, Chapter 2,
2 Chapter 4 Section I, Chapter 5 Sections I and V, Paragraph 6-1, 6-2,
3 6-3, 7-4, 8-3, and 8-12.

4 Three, AR 530, The AR is Army Regulation 530-1, Paragraphs
5 1-5, 1-6, 1-7, and 2-1.

6 Four, 18 United States Code Section 641. Five, 18 United
7 States Code Section 793(e).

8 Six 18 United States Code Section 1030(a)(1).

9 Seven, Executive Order 13526.

10 And eight, Authorization for Use of Military Force.

11 Now, Defense, which ones of those do you object to?

12 ADC[MAJ HURLEY]: Ma'am, just the last one, the Authorization
13 for Use of Military Force.

14 MJ: All right. In that case the government motion to take
15 judicial notice of adjudicative facts in one through seven, is
16 granted. And at issue is eight. Go ahead.

17 ATC[CPT MORROW]: Yes, Your Honor, I'll be brief. Enclosure 8
18 is the Authorization for the Use of Military Force which was a Joint
19 Resolution of Congress, Public Law 107-40. Our understanding, at
20 least the government's understanding is that the defense objects on
21 relevancy grounds. The government would just note for the Court that
22 as part of the Article 104 charge, the United States is required to
23 prove that the recipient of Intelligence was, in fact, the enemy of

1 the United States. Public Law 107-40 is -- or could be used by the
2 trier of fact as evidence that he recipient was a member of an
3 organization that was subject to the AUMF Authorization, the
4 Authorization for the Use of Military Force. And I'll also add that
5 in the government's response to defense bill of particulars the
6 government notified the defense that one of the enemies was Al Qaida
7 and the government would proffer to the Court that during trial the
8 government will provide evidence that Al Qaida was an enemy of the
9 United States including using this as a basis for that fact. Subject
10 to your questions, Your Honor.

11 MJ: I don't think I have any, that's fine. Thank you. Captain
12 Tooman?

13 ADC[CPT TOOMAN]: Quite simply, Your Honor, at this time the
14 defense doesn't feel that Public Law 107-40 is relevant. At such
15 time as the government would proffer some evidence that Al Qaida was
16 an enemy then ----

17 MJ: So, is it the defense's position that Al Qaida is not an
18 enemy?

19 ADC[CPT TOOMAN]: It's the defense's position that the
20 government has to put forth some evidence that the enemy alleged in
21 this case was an enemy under that law. That would be the defense's
22 position. They are required to do that. They would have to proffer
23 some evidence.

1 MJ: Even if they did, how is the law not relevant?

2 ADC[CPT TOOMAN]: Well, the law requires that -- that the
3 information be given to, or the Article 104 requires the information
4 to be given to an enemy. The law determines who the enemy is. It's
5 the government's responsibility to put forth some evidence that the
6 individual who received the evidence fits in that law and once they
7 do that than the law would become relevant, is the defense's
8 position.

9 MJ: Okay. Thank you. All right. Let's move on to -- anything
10 else on the government's request?

11 ATC[CPT MORROW]: Nothing, Your Honor.

12 MJ: Okay. Let's move onto the defense requests and let's begin
13 with the -- first of all the defense request, or the defense response
14 to the government request is Appellate Exhibit 249 and may I have the
15 defense requests for judicial notice please? And for the record that
16 would be the defense request for judicial notice for the excerpts
17 from David Finkel's book *The Good Soldiers*; is Appellate Exhibit 235.
18 And the government response thereto is Appellate Exhibit 236. And
19 let's begin with that one.

20 ADC[CPT TOOMAN]: Mr. Finkel's book, Your Honor?

21 MJ: Yes. As I read your motion you want the Court to take
22 judicial notice that David Finke's book *The Good Soldiers* was
23 published prior to the alleged leaks in this case and the defense

1 further requests the Court to take judicial notice that Mr. Finkel's
2 book contains a verbatim transcript of the audio -- the video charged
3 in Specification 2 of Charge II.

4 ADC[CPT TOOMAN]: That's correct, Your Honor.

5 MJ: Yes, Captain Morrow?

6 ATC[CPT MORROW]: It might help just to limit the issues, we
7 didn't object to the taking of judicial notice that the fact that the
8 book was published prior to the leak of the video.

9 MJ: Well, before we get ----

10 ATC[CPT MORROW]: Narrow the issue for the Court.

11 MJ: Well before we get to -- let's see if we can narrow it even
12 farther. Does the defense -- The defense, I'm a little confused on
13 your motion because you give me a newspaper article citing, I don't
14 know if it's verbatim pages of the book or not. I don't have any
15 pages of the book.

16 ADC[CPT TOOMAN]: Well, Your Honor, I think at the beginning of
17 the newspaper article it says this is a direct excerpt from the book
18 which was about to be published. It was published in advance of the
19 book.

20 MJ: Is the book currently published?

21 ADC[CPT TOOMAN]: Yes, ma'am.

22 MJ: Does the defense have any objection to my taking judicial
23 notice of the book and particular pages in the book?

1 ADC[CPT TOOMAN]: No, ma'am.

2 MJ: And the defense would provide the Court with the book and
3 pages in the book?

4 ADC[CPT TOOMAN]: Yes, ma'am, we can do that.

5 MJ: All right. Does the government object to my taking
6 judicial notice of the existence of the book and relevant pages that
7 the defense cites?

8 ATC[CPT MORROW]: No, Your Honor.

9 MJ: Okay. So that portion of the defense motion for judicial
10 notice for the book and its pages is granted.

11 Go ahead.

12 ADC[CPT TOOMAN]: Quite simply, Your Honor, we feel if you look
13 at a copy of the charged document, the charged video I this case and
14 compare it to the transcript that is provided in that article or once
15 we get you the book when you watch that video side-to-side with the
16 excerpts you are going to see it is a verbatim transcript.

17 MJ: You haven't given me the video.

18 ADC[CPT TOOMAN]: Well, we would ask the government provide you
19 a copy of the video.

20 MJ: Okay. All right. Go ahead. Well, is -- I guess where I'm
21 curious with this is do I give the defense judicial notice of the
22 book linkages more often go are appropriate from counsel. I mean,

1 you can show the fact finder the book and you can show the fact
2 finder the video, and tell them that it's verbatim, right?

3 ADC[CPT TOOMAN]: Right, and I guess at that point, Your Honor,
4 I think it would be -- we would ask the question of the government is
5 whether they dispute that there's a difference between the video and
6 the book.

7 MJ: Government?

8 ADC[CPT TOOMAN]: Any reasonable dispute, Your Honor.

9 ATC[CPT MORROW]: If you read the excerpts in the book, it's
10 just like any narrative. It is talking about things that are
11 happening in multiple different places. Our objection is to the fact
12 you taking judicial notice of the fact that it is a verbatim
13 transcript of the video. We haven't made that comparison. That's
14 something the defense is certainly free to argue at trial, but I
15 don't think it's appropriate for taking judicial notice. I mean it's
16 like, you know, the Bob Woodward book *Bush at War*, I mean if you, you
17 know, you recall a summary of a conversation that happened in the
18 Oval Office a verbatim transcript of that conversation we all know
19 that's not true.

20 MJ: All right. Why don't we do this then. Let's have --
21 Government what I am going to ask you to do is, well, actually, I'm
22 going -- so, defense -- Government, you don't know at this point

1 whether it is a verbatim transcript or not. A verbatim transcript to
2 me means it says exactly the same thing.

3 ATC[CPT MORROW]: Yes, that's our understanding of a verbatim
4 transcript as well.

5 MJ: And is it the defense's position that the book in the pages
6 says a verbatim transcript of what's on that video?

7 ADC[CPT TOOMAN]: Yes, Your Honor, there are portions where, and
8 that was included in the defense motion that it's dialogue between
9 Soldiers.

10 MJ: I understand that, but does that say exactly what's going
11 on the video?

12 ADC[CPT TOOMAN]: That is our contention, yes, Your Honor.

13 MJ: Line by line?

14 ADC[CPT TOOMAN]: Yes, ma'am.

15 MJ: Word by word?

16 ADC[CPT TOOMAN]: Yes, ma'am.

17 MJ: Government, what kind of access can I have to that video?

18 ATC[CPT MORROW]: We can get you a copy of that video today,
19 Your Honor.

20 MJ: All right. Well, Defense, before I rule on this motion I
21 want to see, and have that cued up to me, exactly what you are
22 talking -- well, I can't see it, I don't have the book, so, go ahead
23 and make your argument.

1 ADC[CPT TOOMAN]: Well, I think that, you know, we will get the
2 book, Your Honor, and I guess at this moment we would have to table
3 this until we acquire the book and provide you a copy with it.

4 MJ: Okay. Well, let's go ahead, make your argument now and
5 we'll do the argument. I understand the issues. I'm just not sure
6 of the facts. So, go ahead and make your argument as to why I should
7 take judicial notice of this. I've already taken judicial notice of
8 the book and the pages.

9 ADC[CPT TOOMAN]: Yes, Your Honor. So, it's the defense's
10 position that if the book -- if the book includes a verbatim
11 transcript as the defense is proposing that would mean the author,
12 Mr. Finkel obviously had a copy or had been given access to a copy of
13 the book. That's relevant because the 793 offenses require that
14 information be closely held. So, the defense's position is that if
15 Mr. Finkel, civilian, is provided a copy of this video then it is no
16 longer closely held.

17 MJ: And that's in what specification of what charge?

18 ADC[CPT TOOMAN]: This would be Specification 2 of Charge II,
19 ma'am.

20 MJ: Okay.

21 ADC[CPT TOOMAN]: Subject to your questions, ma'am.

22 MJ: All right. Again, the -- I'm taking judicial notice of the
23 book. I'm taking judicial notice of the date the book was published.

1 Now, is there -- I noticed you haven't asked me and I assume there is
2 going to be evidence presented somehow of the date that Mr. Finkel
3 was an embedded reporter with the unit?

4 ADC[CPT TOOMAN]: I think that would be covered in the book,
5 Your Honor.

6 MJ: Okay. So that would be part of the pages you ask me to
7 judicially notice?

8 ADC[CPT TOOMAN]: Yes, Your Honor.

9 MJ: Okay.

10 ATC[CPT MORROW]: Just one comment, Your Honor, just to caution
11 the Court there are a couple of different -- additional leaks being
12 made here by the defense. Number one that he absolutely had access
13 to a video. We don't know what he had access to. The Court
14 obviously can't take judicial notice of what Mr. Finkel had access
15 to. That's something the defense can argue. I would just like to
16 make that point.

17 MJ: Yeah. Well, if I understand where the defense is going
18 with this, you are saying that Mr. Finkel was an embedded reporter
19 with the unit. It's because of the fact that and your proffer to me
20 is what is written in his book is a verbatim coming from that video
21 that ----

22 ADC[CPT TOOMAN]: He must have seen the video.

23 MJ: ---- he must have seen the video.

1 ADC[CPT TOOMAN]: Yes, Your Honor, or he was on the helicopter
2 but that's not our understanding. So, he must have seen the video.

3 MJ: Okay. Well, at this point give me the book and the pages
4 you want me to take judicial notice of and if you want to go farther
5 than that and you want the Court to consider taking judicial notice
6 of your second piece of the verbatim transcript I need something to
7 say that it's actually verbatim and verbatim to me means word-for-
8 word, not a summary.

9 ADC[CPT TOOMAN]: Yes, Your Honor.

10 MJ: Okay. Government, anything?

11 ATC[CPT MORROW]: Nothing further on that, Your Honor.

12 MJ: Next at issue is the defense notice -- motion for judicial
13 notice of Distributed Common Ground System-Army adequacy. Go ahead
14 Captain Tooman.

15 ADC[CPT TOOMAN]: Yes, Your Honor. Again, here I think the
16 defense position is the attachments included in the defense motion
17 clearly indicate that it was an accepted fact within the Military
18 Intelligence community that the D6A System had the inadequacies that
19 we are requesting judicial notice of. The government's position in
20 their response seems to be that it wasn't universally known, but the
21 defense would point to, I believe it was Attachment C or Enclosure C
22 of our motion which is a memorandum from Major General Michael Flynn
23 who is the Deputy Chief of Staff for Intelligence where he is

1 drafting this memorandum, it's a cover memorandum for a sort of an
2 unclassified report where it's clear he's talking about and sort of
3 speaking for the Intelligence community when he's saying, the system
4 has these issues that we are requesting judicial notice of.
5 Certainly we wouldn't expect a general to be drafting a memorandum if
6 certainly people below him knew what was going on.

7 MJ: Before you continue, I want to ask the government one
8 question. Do you have an objection to my taking notice of the
9 existence of the memorandum from Major General Flynn?

10 ATC[CPT MORROW]: Yes, Your Honor, to the extent that I don't
11 understand the relevance of it at this point. Our objection would be
12 relevance in that case.

13 MJ: Okay. Well, tell me why this fact is relevant then?

14 ADC[CPT TOOMAN]: Can I have a moment, Your Honor?

15 MJ: Yes. And while they are conferring, for the record the
16 government response to the defense notice for the David Finkel book
17 was Appellate Exhibit 236. The defense request for judicial notice
18 for distributing -- notice of Distributed Common Ground System-Army
19 inadequacies is Appellate Exhibit 233 and they are specifically
20 asking me to take judicial notice of inadequacies with the
21 Distributed Common Ground System-Army, DCGS-A, specifically the
22 defense requests judicial notice that the DCGS-A system was prone to
23 crashes and incapable of functioning when not connected to a network.

1 The government response is Appellate Exhibit 234 opposing the
2 judicial notice. Yes, Captain Tooman?

3 ADC[CPT TOOMAN]: Your Honor, the -- this will be relevant on
4 Charge III. The specifications of Charge III. There the issue is
5 the unauthorized software. It's the defense's position that
6 testimony that because of the inadequacies of the DCGS-A machine it
7 was common practice for Soldiers to add other software to their
8 machines. And in addition to the memorandum from General Flynn, you
9 have the correspondence between members of congress and the house
10 appropriations committee where they are talking about specifically
11 these machines don't work when they are not connected to the
12 Internet. There is a series of those letters and then you also have
13 to sort of bolster that position you have the reporting from the
14 media where you have indeed anonymous sources as the government
15 points out but sources nonetheless who are saying, hey, we were just
16 working with this system in the field and it crashed all the time.
17 So we think sort of the totality of all those things when you
18 consider them it supports the defense's position. Subject to your
19 questions, Your Honor.

20 MJ: I think I have -- I don't have any, thank you.

21 ADC[CPT TOOMAN]: Yes, ma'am.

22 MJ: Government? Before you start, Government, assuming I find
23 that -- I find relevance, does the Government have any objection to

1 my taking judicial notice, not judicial notice of the fact itself
2 that the system was prone to crashes, but judicial notice of the
3 memorandum and the accompanying joint urgent operational need request
4 from Major General Flynn.

5 ATC[CPT MORROW]: Assuming you find relevance in the memorandum
6 itself and the contents of the memorandum?

7 MJ: Yes.

8 ATC[CPT MORROW]: No objection, Your Honor. I think it's a
9 reliable source. I still -- The government still refutes it's
10 relevance to even the fact proffered by the defense but again that's
11 up the to Court.

12 MJ: Why would you dispute the relevance and what's the ----

13 ATC[CPT MORROW]: Well, they just proffered that the -- that
14 that's their position that on testimony at trial that the reason for
15 adding an authorized software to the computer so two of the
16 specifications under Charge III is that, to be more specific they are
17 talking about the addition of how he gets to the computers and that
18 was -- the reason for that was that the DCSA system was, you know,
19 the inadequacies of the DCSA system is that it is prone to crashes or
20 not capable of being used if it is not connected to the network. I
21 mean, I just note that just for the Court's knowledge that Wget is a
22 web crawler so that the fact that if something may or may not be
23 capable of being used when it's not connected to a network, I don't

1 know how the addition of Wget speaks to that particular fact. But, I
2 mean, that's just -- when asked that of us.

3 MJ: Okay, well ----

4 ATC[CPT MORROW]: The more important thing and just to go back
5 to what the defense has actually asked the Court to take judicial
6 notice of is the inadequacies of the DCGSA system and I would just
7 ask the Court to take a very careful look at the enclosures the
8 defense provided in this respect. You know, if you take the language
9 -- the prone to crashes language directly out of a political article
10 I mean, I don't want to speak to that, but I would just raise that to
11 the Court, it's also as the defense noted none-source. The Joint
12 Urgent Operational Needs Statement that was cited by the defense in
13 their motion also Attachment C to their motion I'll just read one
14 piece of that. And again, just remember this is evidence supposedly
15 of the inadequacies of the DCSA system, but if you actually look at
16 the JUON, the Joint Urgent Operational Needs Statement, the thing
17 they are requesting, they are requesting that the Army or DoD
18 purchase a new system for Intelligence gathering and analyst work and
19 if you look at the second page of that JUON it says, the system will
20 interface with and allow rapid access to existing Intelligence and
21 information databases such as CIDNE which is subject to this case,
22 the DCA, ACTS, M3, TIGR, etcetera. It says nothing about the
23 inadequacies about the DCSA system only that this new system that

1 they want to buy would supplement the already existing system, DCGSA.

2 So, I just want to point that out to you.

3 MJ: All right.

4 ATC[CPT MORROW]: In general, Your Honor, the government's
5 position is that these two facts are inappropriate for judicial
6 notice in this case in that they were not widely known in the -- even
7 in the Military Intelligence community. General Flynn is the -- one
8 of the foremost authorities in the Intelligence community, at least
9 in the Army, and even that Joint Urgent Operational Needs Statement
10 doesn't say what the defense believes it says.

11 MJ: All right. Well, Captain Morrow, don't go anywhere for
12 right now.

13 ATC[CPT MORROW]: Okay.

14 MJ: Let me look at Attachment A. Assuming the Court finds
15 relevance does the government have any objection to my taking
16 judicial notice of Attachment A?

17 ATC[CPT MORROW]: What it is?

18 MJ: Yes.

19 ATC[CPT MORROW]: No, Your Honor. It's just -- And just for
20 everyone's edification the government believes it's just a manual on
21 what DCSA is, is that correct?

22 MJ: Attachment A as I'm looking at it is something put out, at
23 least according to the block on the bottom, something by HQDA, DCS-G2

1 initiatives group as of July 2011 as sort of an info paper on the
2 Distributed Common Ground System-Army.

3 ATC[CPT MORROW]: Right.

4 MJ: Okay. So, does the government have any objection to my
5 taking judicial notice of the existence of that?

6 ATC[CPT MORROW]: No, Your Honor.

7 MJ: All right. Let's look at Attachment B, the commander's
8 handbook to Distributed Common Ground System-Army. Does the
9 government -- dated 30 March 2009, does the government have any
10 objection to my taking judicial notice to that?

11 ATC[CPT MORROW]: Uhm ----

12 MJ: The existence of that?

13 ATC[CPT MORROW]: No, Your Honor, but I would just -- just for
14 clarification the defense hasn't asked for the Court to take judicial
15 notice of any of these manuals.

16 MJ: I understand that.

17 ATC[CPT MORROW]: Yes, Your Honor. No, Your Honor.

18 MJ: Okay. All right. We have already discussed C. Major
19 Flynn -- Major General Flynn, excuse me.

20 ATC[CPT MORROW]: Yes, ma'am.

21 MJ: Attachment D is a letter from three congressmen to Chairman
22 Dicks and Dear Ranking Member Young, so this would be to the House
23 Appropriations Committee, Sub Committee on Defense and the House ----

1 ATC[CPT MORROW]: It's the Chairman Ranking Member, yes, ma'am.

2 MJ: Does the government have any objection to my taking
3 judicial notice of Attachment -- the existence of Attachment D?

4 ATC[CPT MORROW]: We do to the extent that we are not sure it's
5 relevant to DCGS-A. I'm just scanning it right now and it talks
6 about the Global Knowledge Management System, but it isn't talking
7 about -- doesn't speak to the Distributed Common Ground System-Army.
8 So, if we're sort of taking judicial notice of documents or public
9 orders or other things that are related to the DCGS-A system the
10 government is, based on what it is generally going to have no
11 objection but, you know, this letter is not -- doesn't say anything
12 about DCGS-A.

13 MJ: Okay. Let's look at Attachment E, another letter from a
14 colonel to Chairman Dicks. It would be Peter Newell, current U.S.
15 Army, Director Rapid Equipment Force is responding to I believe,
16 based on the date, July 28th 2010, it's responding to the letter in
17 Attachment D and the response does ----

18 ATC[CPT MORROW]: Can I note one thing for the Court, Your
19 Honor?

20 MJ: Yes.

21 ATC[CPT MORROW]: Just, we noticed briefly in our fact section
22 of our motion, but just to reiterate all of these -- all of this
23 correspondence post-dates the accused's deployment. It's all after

1 May 27th 2010, other than the two regulations or info papers dealing
2 with DCGS-A, all the correspondence post-dates the accused's
3 deployment.

4 MJ: Okay. So, you do object?

5 ATC[CPT MORROW]: We would object on that ground, yes, Your
6 Honor.

7 MJ: Okay.

8 ATC[CPT MORROW]: And that includes all the newspapers articles
9 towards the end.

10 MJ: All right. I guess Attachment F is another letter ----

11 ATC[CPT MORROW]: Yes, ma'am, dated August 25th 2010.

12 MJ: ---- to Colonel Newell from two other congressmen. So the
13 objection from the government though, I mean is the objection with
14 respect to these documents that they are not relevant, that they
15 post-date the deployment of the accused, does the government have any
16 objection to the authenticity of these documents, the fact that they
17 were sent?

18 ATC[CPT MORROW]: No. No. Absolutely not, Your Honor.

19 MJ: Okay. And that would be true as well for Attachment G?

20 ATC[CPT MORROW]: G is the letter back to Colonel Newell?

21 MJ: Yes.

22 ATC[CPT MORROW]: I'm sorry, I closed my ----

23 MJ: G is a letter to General Dempsey from a Mr. Smith in congress.

1 ATC[CPT MORROW]: We wouldn't object to the authenticity of that
2 letter as well.

3 MJ: Okay. And then Attachment H I believe you told me
4 something about the newspaper article ----

5 ATC[CPT MORROW]: It's a politico Internet article, dated June
6 29th 2011.

7 MJ: All right. Does the government have an objection to that?

8 ATC[CPT MORROW]: Which part of it, Your Honor? Just taking
9 that the ----

10 MJ: Yes.

11 ATC[CPT MORROW]: The fact that there was an Internet news
12 article?

13 MJ: Well, alright, scratch that. And then Attachment I is a
14 newspaper article as well, is that correct?

15 ATC[CPT MORROW]: Again, you know, I'm not even sure from what -
16 - what source it's from. I mean it's Internet it looks like but ----

17 MJ: Okay.

18 ATC[CPT MORROW]: ---- I don't even know what it's from.

19 MJ: Alright. Go ahead and continue.

20 ATC[CPT MORROW]: That's it, Your Honor. Subject to your
21 questions for any others.

22 MJ: Thank you. Anything further from the defense?

1 ADC[CPT TOOMAN]: Just briefly, Your Honor. I would like to
2 touch briefly on the relevance, the comments the government made.
3 The defense would just point out that the practice of adding software
4 is something this Court has ample evidence already on the record to
5 look and see that that was a common practice. If you just look at
6 the evidence already on the record you will see that was a common
7 practice.

8 As far as the post-dating of the articles, in the defense's
9 opinion that makes those articles more relevant. If they were pre-
10 dated to PFC Manning's deployment, the issues that were -- that we're
11 raising could have been fixed. We wouldn't know but by the articles
12 being post-dated it's clear that they are discussing a system that
13 was in place at the time of PFC Manning's deployment.

14 Finally, Your Honor, the government seems to be intimating
15 that the news articles that the defense has offered the Court are not
16 reliable. That's certainly their intimation and they are welcome to
17 offer the Court any evidence they have that would suggest that those
18 are not reliable sources. Thank you, Your Honor.

19 MJ: Does the defense have any authority for a Court to take
20 judicial notice of newspaper articles?

21 ADC[CPT TOOMAN]: I'm sorry, Your Honor.

22 MJ: Does the defense have any authority for the Court to take
23 judicial notice of newspaper articles?

1 ADC[CPT TOOMAN]: I think the -- It's just a balancing act of
2 the reliability under 201 and we think that if there is not evidence
3 that it is not a reliable source then absolutely the judge could take
4 judicial notice.

5 MJ: Okay. Let me ask the defense a question. Should the Court
6 not be inclined to take judicial notice of the facts that you are
7 alleging in this, which would be in edict that the Court -- coming
8 from the Court that there are inadequacies with the Distributed
9 Common Ground System-Army and taking judicial notice that the DCGS-A
10 system was prone to crashes and incapable of functioning when not
11 connected to a network. In the alternative does the defense want me
12 to consider taking judicial notice of the documents I have just
13 described?

14 ADC[CPT TOOMAN]: Yes, please, Your Honor.

15 MJ: Alright. Let's move on to the public -- well, let's move
16 on to the public statements. Now, before we begin I have the defense
17 motion for judicial notice in admission of public statements which
18 Appellate Exhibit 237 and the government response to the defense
19 motion for judicial notice in admission of public statements. Now,
20 before we continue, Government, I have from your response that the
21 government does not object to the Court taking judicial notice of the
22 statement of Geoff Morrell, Pentagon, President Secretary -- Press

1 Secretary as articulated in Paragraph 2a in the defense motion. Is
2 that correct?

3 ATC[CPT MORROW]: Yeah, I'm sorry, Your Honor, we were -- the
4 motion isn't entirely clear, we apologize for -- the government
5 apologizes for that. We don't object to the taking of judicial
6 notice that there was a public statement made by Geoff Morrell on a
7 particular date, I believe it was April 25th 2011, but we would object
8 -- we would dispute or at least I would -- we don't think it is
9 appropriate to take -- that content of the statement should actually
10 be admitted based on our objection to -- under 801, the defense's
11 argument or 801(d)(2)(b) and (d). Does that make sense?

12 MJ: So the government ----

13 ATC[CPT MORROW]: So ----

14 MJ: --- The government's -- So, you do object?

15 ATC[CPT MORROW]: We do object to the contents of the
16 statements, yes, Your Honor, but the fact that a statement was made
17 by a particular official on a date, the government has no objection
18 to taking judicial notice to that statement.

19 MJ: Well, how would it be rele -- how could it possibly be
20 relevant to ----

21 ATC[CPT MORROW]: I don't know, Your Honor, that's the ----

22 MJ: ---- if that statement doesn't come in?

1 ATC[CPT MORROW]: That's the defense's burden for relevance, not
2 ours.

3 MJ: Okay. So, you dispute that the admission of the party
4 opponent?

5 ATC[CPT MORROW]: There is.

6 MJ: Or agent of a party opponent?

7 ATC[CPT MORROW]: Or agent of the government, yes.

8 MJ: All right.

9 ADC[CPT TOOMAN]: One moment, please, Your Honor.

10 MJ: Okay.

11 ADC[CPT TOOMAN]: Thank you, Your Honor. As far as the
12 relevance issue that the government just raised the defense would
13 offer that we'll provide the relevance before it goes to the trier of
14 fact. We just ask for before that happens the judge, Your Honor,
15 take judicial notice of it at this point.

16 MJ: Well, let me ask you a question before you begin. This is
17 all relevant only to sentencing, is that correct?

18 ADC[CPT TOOMAN]: Sure. That's correct, Your Honor.

19 MJ: All right. So, arguably there we may even be dealing with
20 relaxed rules potentially but at this point you are not asking me
21 under relaxed rules or are you?

22 ADC[CPT TOOMAN]: No, Your Honor.

23 MJ: Okay. Go ahead.

1 ADC[CPT TOOMAN]: Your Honor, I'll begin by addressing I guess
2 the individual statements that the government objected to and then
3 addressing the admissibility argument the government included in
4 their response. As far as the statements from Lieutenant Colonel
5 Lapin and I apologize if I'm pronouncing that wrong, in Attachment C
6 and D we think that Your Honor can deduce that on its face by reading
7 the enclosures and reading the defense's proffer. As far as the
8 letter from Secretary Gates referenced in Enclosure D, we think that
9 is well ----

10 MJ: Well, let's -- this is going to make it a little more
11 awkward but very helpful for me. I would like to go statement by
12 statement and hear both parties with respect, rather than go through
13 the whole litany of one side and the whole litany of the other side.

14 ADC[CPT TOOMAN]: Okay.

15 MJ: So I can get a clear picture of what the parties positions
16 are with respect to each statement. So, let's start with the ----

17 ADC[CPT TOOMAN]: Lieutenant Colonel Lapin?

18 MJ: Yes.

19 ADC[CPT TOOMAN]: This one in Enclosure Charlie, Your Honor.

20 MJ: All right. And the statement you are asking me to take
21 from him ----

22 ADC[CPT TOOMAN]: Is that the preliminary review by the Pentagon
23 has not identified any documents that would damage national security.

1 If you look there it is sort of the bottom-third of the page, and
2 this is sort of, I guess, an inference that Your Honor would have to
3 make but you have a statement from Secretary Gates saying what the
4 Pentagon assessment determined and then you have the spokesperson,
5 Lieutenant Colonel Lapin, saying that is still valid.

6 MJ: All right, Captain Tooman, judicial notice is not for the
7 purpose of the Court making linkages. Are you asking me to take
8 judicial notice of particular statements these people made?

9 ADC[CPT TOOMAN]: Yes, Your Honor.

10 MJ: And the linkages can be made by the defense?

11 ADC[CPT TOOMAN]: Yes, Your Honor.

12 MJ: So, I mean if you are asking me to make linkages and take
13 this person said this and this person said that therefore I'm going
14 to presume and I'm going to tell the court members that the Court is
15 taking judicial notice of some kind of conclusion. I'm not going to
16 do that.

17 ADC[CPT TOOMAN]: Okay.

18 MJ: So, let's tailor our argument here. Just tell me what
19 statements you want me to take notice that are in here that people
20 said.

21 ADC[CPT TOOMAN]: I think that -- Well, should we go enclosure
22 by enclosure or individual by individual, Your Honor?

23 MJ: What is easier for me?

1 ADC[CPT TOOMAN]: I think that we could probably -- Could I have
2 a moment, Your Honor?

3 MJ: Yes.

4 ADC[CPT TOOMAN]: I think -- Your Honor, I think it would
5 probably be easier to go individual by individual and I think we can
6 probably just scrap Lieutenant Colonel Lapin and move right on to
7 Secretary Gates.

8 MJ: All right. So, we don't want Lieutenant Colonel -- or we
9 don't want Lapin -- or Lieutenant Colonel Lapin any more, right?

10 ADC[CPT TOOMAN]: That's correct, Your Honor.

11 MJ: Okay.

12 ADC[CPT TOOMAN]: So, if you look at Enclosure D you have direct
13 quotes in here of a letter that Secretary Gates wrote to, uh, a
14 congressperson.

15 MJ: Okay.

16 ADC[CPT TOOMAN]: And if you look at Page 1 of 3 there, the last
17 sort of big paragraph it says, in his letter to Levine he struck a
18 more measured tone in describing impact, "Our initial review
19 indicates most of the information contained in these documents
20 relates to tactical military operations", and it goes on. "So, we
21 would be requesting the initial assessment in no way discounts the
22 risk to national security; however, the review to date has not

1 reviewed any sensitive Intelligence sources and methods compromised
2 by this disclosure".

3 MJ: All right.

4 ADC[CPT TOOMAN]: So, that's what we would request.

5 MJ: So, you are requesting that I take judicial notice of his
6 statement in this ----

7 ADC[CPT TOOMAN]: In this article, yes, Your Honor.

8 MJ: ---- article. Okay. Government, do you have any objection
9 to that?

10 ATC[CPT MORROW]: We do have an objection to that, Your Honor,
11 and as stated in the motion, they didn't provide the letter which
12 would be the more reliable source in this case. Our objection is
13 based on that.

14 MJ: Now, this letter would be -- has the defense asked for that
15 letter in discovery?

16 ADC[CPT TOOMAN]: I don't believe we have, Your Honor.

17 ATC[CPT MORROW]: I can inform the Court now, we don't have a
18 copy of that letter but defense is certainly privy to gather a copy
19 of that.

20 MJ: Or the government could do it with a rule of completeness.

21 ATC[CPT MORROW]: I suppose we could, Your Honor.

22 MJ: Any other objection?

23 ATC[CPT MORROW]: One moment, Your Honor. Nothing, Your Honor.

1 MJ: All right. Let me just ask you, I mean I understand your
2 objection that these are snippets and are not complete. Does the
3 government proffer to the Court that these statements were never
4 said?

5 ATC[CPT MORROW]: No, Your Honor, just -- just -- I mean the
6 rule M.R.E. 201 with reference to a reliable source and we would just
7 ask that if the statements are going to be -- if there is judicial
8 notice of the statement, whether that statement be made that it be of
9 the actual letter itself, not a quote of the letter in the news
10 article. That's it.

11 MJ: Now, do you -- initially when we were talking about Colonel
12 Lapin, you were also objecting on the grounds that it wasn't a
13 statement of under M.R.E. 801(d), I think it was (1)(d), is that what
14 the defense offered it under.

15 ATC[CPT MORROW]: Right.

16 MJ: Does the government have the same object to Secretary
17 Gates?

18 ATC[CPT MORROW]: Yes, Your Honor. But if you actually look at
19 Attachment C, I know that the defense has withdrawn that request but
20 it doesn't even have Colonel Lapin's -- a statement from Colonel
21 Lapin in the article. I'm just ----

1 MJ: No, no, no, I understand that. The defense has proffered
2 that these statements are non-hearsay under M.R.E. 801(b)(2) and
3 M.R.E. 801(d)(2)(b). Does the government dispute that?

4 ATC[CPT MORROW]: We would dispute their admissibility under
5 relevant case law under 801(d)(2)(b) and (d), yes. Because that was
6 -- The defense motion was, "Court please take judicial notice of
7 these statements and secondly admit them as non-hearsay essentially
8 under 801(d)(2)(b) and (d)," and that's our objection, of course to
9 all of those statements, is that government case law says these
10 statements -- these are not the type of statements that would be
11 admissible against a party opponent. In other words the government
12 in this case.

13 MJ: All right. Now, I see the government's argument there and
14 I see the defense's. You believe it is admissible and you believe
15 it's not and the case law will say. Let's assume I relax the rules -
16 - Let's assume the defense asks me to relax the rules on sentencing.
17 What's the government's position?

18 ATC[CPT MORROW]: One moment, Your Honor. Preliminarily, Your
19 Honor, I guess we, you know, if the Court did relax the rules or if
20 the defense asks the Court to relax the rules for sentencing then the
21 government, we would like to defer that -- our objection, but we
22 would likely have no objection at that point.

1 MJ: Okay. Let me ask you a question as I'm going through with
2 this particular issue here. I'm noticing the time and I'm noticing
3 what we have to do this afternoon. There are engagements that the
4 Court needs to address with the parties or the defense has to be some
5 place by 1300. I've already asked the defense to more narrowly
6 tailor this motion because the Court isn't making linkages in
7 judicial notice. So, what particular statements you want me to take
8 of particular individuals, I'd like to address that. The government,
9 have you had an opportunity to think through the sentencing rules
10 what's admissible when the rules are not relaxed versus what's
11 admissible when the rules are relaxed?

12 ATC[CPT MORROW]: To be honest, Your Honor, we have not had an
13 opportunity to really -- well, I mean, preliminarily we kind of know
14 the rules but we would like an opportunity to review that if the
15 Court's going to go that direction.

16 MJ: Well, I'm looking at tabling this until tomorrow. This
17 particular small piece of it. Does either side have an objection to
18 that?

19 ADC[CPT TOOMAN]: No, Your Honor.

20 ATC[CPT MORROW]: No objection, Your Honor.

21 MJ: Okay. Do we want to argue it first or to litigate it first
22 thing in the morning or do you want to do it later on in the day

1 tomorrow, because that's really, other than the rulings of the Court
2 that's what we have tomorrow.

3 ADC[CPT TOOMAN]: The defense would prefer to do it first thing,
4 Your Honor.

5 ATC[CPT MORROW]: First thing is fine, Your Honor.

6 MJ: All right. So, let's table this particular issue. We'll
7 start again and we'll start from the beginning again.

8 ATC[CPT MORROW]: Just so the government is clear, Your Honor,
9 the defense is going to sort of clarify or narrow what statements
10 they would like judicial notice of and then we'll all discuss the
11 admissibility issue.

12 MJ: Can you do that because you have already pulled Colonel
13 Lapin?

14 ADC[CPT TOOMAN]: I think that was the only one that would
15 require narrowing, Your Honor. I think that was -- Your Honor talked
16 about linkage and I think that was the only statement that required
17 linkage. Everything else is direct quotes.

18 MJ: I thought there was some in here where I couldn't find the
19 statement that you alleged was made. Government I think you pointed
20 that out, which one was that?

21 ATC[CPT MORROW]: It was the statement of Representative Conyers
22 and in fact, I mean, the defense can do this, but they provided the

1 actual congressional testimony of Conyers yesterday to the
2 government.

3 MJ: Oh, do I have that?

4 ADC[CPT TOOMAN]: Yes, Your Honor, you do. Well, I included it
5 as an enclosure.

6 MJ: And you added that yesterday?

7 ADC[CPT TOOMAN]: Yes, ma'am.

8 MJ: Okay, so I don't have it in what you sent me earlier?

9 ADC[CPT TOOMAN]: That's correct. We can get you a copy, ma'am.

10 MJ: I will need a copy of that as well. Okay. And is he the only
11 one where there's an issue on whether a statement was made or not?

12 ADC[CPT TOOMAN]: I believe so. We had one other statement of
13 Secretary Clinton was quoted in a news article but it was so
14 disjointed that it was unclear where the statement began and ended.
15 That's noted in our motion but we can discuss that tomorrow as well.

16 ADC[CPT TOOMAN]: Permission to approach, ma'am.

17 MJ: Yes. Thank you. All right. The Court has the last
18 enclosure which is from the Committee on the Judiciary House of
19 Representatives. The Court would appreciate the parties positions on
20 both under the Rules of Evidence relaxed and not relaxed.

21 ATC[CPT MORROW]: Yes, ma'am.

22 MJ: Anything else we need to address today before we recess the
23 Court?

1 ATC[CPT MORROW]: No, Your Honor.
2 ADC[CPT TOOMAN]: No, Your Honor.
3 MJ: All right. Court is in recess.
4 [The Article 39(a) session recessed at 1221, 29 August 2012.]
5 [END OF PAGE]

Pages 1875 through 1905 of this transcript are classified “TOP SECRET”. This session (29 August 2012, Session 1) is sealed for Reasons 1 and 4, Military Judge’s Seal Order dated 17 January 2014 and is stored at the Office of the General Counsel, Central Intelligence Agency.

Page 1906 of this transcript is classified "TOP SECRET".

This session (30 August 2012, Session 1) is sealed for Reasons 1 and 4, Military Judge's Seal Order dated 17 January 2014 and is stored at the Office of the General Counsel, Central Intelligence Agency.

1 [The Article 39(a) session was called to order at 1009, 30 August
2 2012.]

3 MJ: This Article 39(a) session is called to order. Let the
4 record reflect all parties present when the Court last recessed are
5 again present in court except the court reporter and that would be?

6 REPORTER: Staff Sergeant Foy, Your Honor.

7 MJ: Thank you. I'd like to begin by addressing the Court's
8 scheduling order. Counsel and I met in chambers yesterday for an
9 R.C.M. 802 Conference. Once again that's where counsel and I discuss
10 issues of logistics and other such things that will arise in cases
11 and we put that on the record at the next session.

12 The Scheduling Order has been marked as Appellate Exhibit,
13 may I see it please?

14 [The court reporter handed the Appellate Exhibit 286 to the military
15 judge.]

16 MJ: Appellate Exhibit 286. And some of the dates that we
17 originally announced have changed. I'd like to go over those dates
18 now that the parties and the Court have agreed to and just set forth
19 for the record the major issues that are anticipated at these
20 sessions. Now, once again as in all court cases sometimes these
21 things can change but as of now we have the next Article 39(a)
22 session set for the 17th and the 18th of October. Thus the earlier
23 session that we had originally scheduled for the 1st through the 5th

1 of October is no longer going to take place. So the next session
2 will be the 17th and 18th of October and at issue will be speedy
3 trial -- witnesses for the speedy trial motion. That's the primary
4 issue we are looking at for litigation at that session.

5 Following that, the next Article 39(a) session is scheduled
6 for the 29th of October through the 2nd of November 2012 and at issue
7 in that session is anticipated to be the defense's motion to dismiss
8 for violation of Article 10, UCMJ speedy trial. And also at issue in
9 that session is going to be, well it may be at issue, is production
10 of witnesses for the defense's Article 13 motion, which is unlawful
11 pretrial punishment.

12 The next scheduled session is going to be the 27th of
13 November through the 2nd of December and that will be the actual
14 Article 13 motion and the litigation of that motion.

15 The following session will be the 10th through the 14th of
16 December and that will involve pretrial witness and evidentiary
17 issues.

18 The next session will be the 14th through the 18th of
19 January of 2013. That session will involve the handling of
20 classified information during the trial.

21 And the last motion session that we have on the agenda is
22 the 28th and 29th of January which will be the inevitable last minute
23 motions that arise before trial.

1 Voir dire, which is questioning of court members is
2 scheduled to begin on the 30th of January, that will be the 30th and
3 the 31st of January and the trial is scheduled from the 4th of
4 February through the 15th of March.

5 And again the scheduling order is at Appellate Exhibit 286.
6 Does either side desire to supplement anything I've said about the
7 scheduling order?

8 CDC[MR. COOMBS]: No, Your Honor.

9 TC[MAJ FEIN]: No, Your Honor.

10 MJ: Court is prepared to rule on several issues this morning.
11 We will begin with the government motion for M.R.E. 505(g)(2),
12 Redactions for the CIA WikiLeaks Task Force Report on a discrete
13 matter.

14 On 3 August 2012, the government filed a classified motion
15 moving the Court to conduct an *ex parte* review of the CIA WikiLeaks
16 Task Force Report on a discrete matter and to authorize a
17 substitution for the discoverable classified information in the CIA
18 Report in accordance with M.R.E. 505(g)(2).

19 The Court conducted an *in camera* review with both the
20 original CIA report and the proposed substitution. After conducting
21 an *in camera* review on 29 August 2012, the Court and the government
22 held an *ex parte in camera* Article 39(a) session at a secure location
23 where classified information may be discussed. The concerns raised

1 by the Court in the *ex parte in camera* Article 39(a) session have
2 been addressed by the government.

3 In coming to this ruling the Court has considered the
4 factors requested by the defense in its 21 August 2012, submission.

5 a. What is the extent of the redactions/ substitution's?

6 b. Has the government narrowly tailed the substitutions
7 to protect the government interest that has been clearly and
8 specifically articulated?

9 c. Does the substitution provide the defense with the
10 ability to follow-up on leads that the original document would have
11 provided?

12 d. Do the substitutions accurately capture the
13 information within the original document?

14 e. Is the classified evidence necessary to rebut an
15 element of the 22 charged offenses; bearing in mind the government's
16 very broad reading of many of these offenses?

17 f. Does the summary strip away the defense's ability to
18 accurately portray the nature of the charged leaks?

19 g. Do the substitutions prevent the defense from fully
20 examining witnesses?

21 h. Do the substitutions prevent the defense from
22 exploring all viable avenues for impeachment?

1 i. Does the government intend to use any of the
2 information from the matter? If so, is this information limited to
3 the summarized document provided by the government? If the
4 information is to be used by the government is not limited to the
5 summarized document does the defense in fairness need to receive the
6 classified portions of the document to put the government evidence in
7 proper context?

8 j. Does the original classified evidence present a more
9 compelling sentencing case then proposed substitutions by the
10 government?

11 k. Do the proposed substitutions prevent the defense from
12 learning the names of potential witnesses?

13 l. Do the substitutions make sense such that the defense
14 will be able to understand the context?

15 m. Is the original classified evidence necessary to help
16 the defense in formulating defense strategy and making important
17 litigation decisions in the case?

18 n. Is it unfair that the government had access to the
19 unclassified version of the damage assessment and the defense did
20 not? Does that provide a tactical advantage to the government?

21 The CIA report substitution as redacted meets the
22 government's discovery obligations under *Brady* and R.C.M. 701(a)(6)
23 to disclose evidence tending to reasonably negate the guilt of the

1 accused to an offense charged, reduce the degree of guilt to an
2 offense charged or reduce the punishment.

3 The redacted information not disclosed to the defense is
4 not favorable, material to the preparation of the defense, or
5 relevant and necessary for production under R.C.M. 703(f).

6 The government is ordered that no portion of the CIA report
7 not disclosed to the defense will be used by the government or any
8 government witness during any portion of the trial. This includes
9 rebuttal and rule of completeness if defense introduces or references
10 anything in the substitution.

11 The substitution is sufficient for the defense to
12 accurately prepare for trial and represents an appropriate balance
13 between the right of defense to discovery and the protection of
14 specified -- specifically identified national security information
15 that risks release of Intelligence sources and methods.

16 Ruling:

17 The classified motion by the government to voluntarily
18 provide limited disclosure under M.R.E. 505(g)(2) for the CIA Report
19 on a discrete matter is granted.

20 That's Appellate Exhibit 284.

21 The Court also has a ruling on the government motion for
22 Military Rule of Evidence 505(g)(2) redactions for DIA records.

1 On 3 August 2012, and 17 August 2012, the government filed
2 classified motions moving the Court to conduct an *ex parte* review of
3 DIA Records classified at the Secret or above level in accordance
4 with M.R.E. 505(g)(2) and to approve proposed redactions.

5 After conducting the *in camera* review on 29 August 2012,
6 the Court and the government held an *ex parte in camera* Article 39(a)
7 session at a secure location where classified information may be
8 discussed. The concerns raised by the Court in the *ex parte in*
9 *camera* Article 39(a) session have been addressed by the government.

10 In coming to this ruling the Court has considered the
11 factors requested by the defense in its 21 August 2012, submission.
12 Those are the same factors that I read for the last ruling.

13 The DIA records as redacted meet the government's discovery
14 obligations under *Brady* and R.C.M. 701(a)(6) to disclose evidence
15 tending to reasonably negate the guilt of the accused to an offense
16 charged, reduce the degree of guilt to an offense charged or reduce
17 the punishment.

18 The redacted information not disclosed to the defense is
19 not favorable or material to the preparation of the defense under
20 Military Rule of Evidence 701(a)(2).

21 The government is ordered that no portion of the DIA
22 records not disclosed to the defense will be used by the government
23 or any government witness during any portion of the trial. This

1 includes rebuttal and rule of completeness if defense introduces or
2 references anything in the substitution.

3 A substantial portion of the DIA records is disclosed to
4 the defense. The redacted information is information that is not
5 relevant to the case. An example would be a long email with a small
6 paragraph referencing this case. The part of the email addressing
7 irrelevant subject matter is redacted. Other redactions are to
8 protect the release of sensitive national security information to
9 include Intelligence sources and methods. The substitution is
10 sufficient for the defense to accurately prepare for trial. It
11 represents an appropriate balance between the right of the defense to
12 discovery and the protection of specifically identified national
13 security information that risks release of Intelligence sources and
14 methods.

15 Ruling:

16 The classified motion by the government to voluntarily
17 provide limited disclosure under M.R.E. 505(g) (2) for the DIA records
18 is granted.

19 Ordered this 30th day of August 2012.

20 Would the parties like to address anything on those
21 rulings?

22 TC[MAJ FEIN]: No, Your Honor.

23 CDC[MR. COOMBS]: No, Your Honor.

1 MJ: Okay. All right. The Court is also prepared to rule on
2 the admissibility of evidence under M.R.E. 404(b) that was litigated
3 yesterday. What the Court is going to do, I am not going to read the
4 entire ruling until after the merits portion of this trial. I'm
5 going to simply announce that Military Rule of Evidence 404(b), Act
6 I, the June 2008 Internet posting by the accused in corrective
7 training is admissible under M.R.E. 404(b). M.R.E. 404(b), Act II,
8 is admissible under M.R.E. 404(b). M.R.E. 404(b), Act III, is not
9 admissible under M.R.E. 404(b).

10 The government also requested a ruling on whether the
11 Military Rule of Evidence 404(b) act proffered by the government can
12 rebut a good Soldier defense. The government may use specific
13 instances of conduct to cross-examine witnesses presenting good
14 Soldier character evidence on behalf of an accused with have you
15 heard; did you know; were you aware questions so long as the
16 government has a good-faith basis to inquire. Each of the three
17 uncharged acts provides that good-faith basis.

18 The Ruling:

19 Government motion to admit evidence of M.R.E. 404(b) Acts I
20 and II is granted. The government motion to admit M.R.E. 404(b) Act
21 III is denied.

22 And finally, the Court is prepared to rule on the
23 government and defense motions for judicial notice of adjudicative

1 facts that was also litigated yesterday. The government moves this
2 Court to take judicial notice of the following adjudicative facts:

3 1. Army Regulation 25-2, Paragraphs 1-4, Paragraphs 1-4,
4 1-5, 3-3, 4-5, 4-16, 4-17, and Figure B1.

5 2. AR 380-5, Paragraphs 1-20, 1-21, 1-22, Chapter 2,
6 Chapter 4 Section I, Chapter 5 Sections I and V, Paragraph 6-1, 6-2,
7 6-3, 7-4, 8-3, and 8-12.

8 3. AR 530-1, Paragraphs 1-5, 1-6, 1-7, and 2-1.

9 4. 18 United States Code Section 641.

10 18 United States Code Section 793(e).

11 19 United States Code Section 1030(a)(1).

12 And seven, Executive Order 13526.

13 And eight, Authorization for Use of Military Force.

14 The defense objects to the Court taking judicial notice of
15 8, Authorization for the Use of Military Force on the grounds that
16 it's not relevant under M.R.E. 401. Defense does not object to the
17 government motion for the Court to take judicial notice of regulatory
18 paragraphs in Paragraphs 1-7 evolved. The government motion to take
19 judicial notice of adjudicative facts in Paragraph 1-7 is granted.

20 The defense moves this Court to take judicial notice of the
21 following adjudicative facts:

22 Excerpts from David Finkel's book *The Good Soldiers*.

1 1. The defense requests the Court to take judicial notice
2 that David Finkel's book *The Good Soldiers* was published prior to the
3 alleged leaks in this case and to take judicial notice that Mr.
4 Finkel's book contains audio from the video charged in Specification
5 2 of Charge II.

6 2. The government does not object to the defense [sic]
7 taking judicial notice that David Finkel's book was published prior
8 to the leaking of the video in Specification 2 of Charge II. The
9 government objects to the Court taking judicial notice that David
10 Finkel's book contains a verbatim transcript of the video charged in
11 Specification 1 [sic] of Charge II.

12 The defense also requests that the Court take judicial
13 notice of the inadequacies of the Distributed Common Ground System-
14 Army, DCGS-A.

15 1. The defense moves the Court to take judicial notice of
16 inadequacies with the Distributed Common Ground System-Army, DCGS-A,
17 specifically that the system was prone to crashes and incapable of
18 functioning when not connected to a network.

19 2. The government opposes on the ground that the
20 information supplied by the defense does not support the proposition
21 that inadequacies and issues with the DCGS-A were well known or even
22 generally known within the military community.

23 The law:

1 [1.] Military Rule of Evidence 201 governs judicial notice
2 of adjudicative fact. The judicially noticed fact must be one not
3 subject to reasonable dispute in that it either one, is generally
4 universally loc -- generally known, universally, locally or in the
5 area pertinent to the event. Or, two, capable of accurate and ready
6 determination by resort to sources whose accuracy cannot be
7 reasonably questioned. *United States v. Needham*, 23 M.J. 383, Court
8 of Military Appeals, 1987; *United States v. Brown*, 33 M.J. 706, Army
9 Court of Military Review, 1991.

10 2. Military Rule of Evidence 201(c) requires the military
11 judge to take judicial notice of adjudicative facts requested by a
12 party and supply that the necessary information.

13 3. When a military judge takes judicial notice of
14 adjudicative facts the fact finder is instructed that they may but
15 are not required to accept as conclusive any matter judicially
16 noticed.

17 4. Judicial notice is of adjudicative facts. Judicial
18 notice is not appropriate for inferences a party hopes a fact finder
19 will draw from the facts judicially noticed. Legal argument and
20 conclusions are not adjudicative facts subject to judicial notice.
21 *United States v. Anderson*, 22 M.J. 885, Air Force Court of Military
22 Review, 1985; which ruled that it was appropriate to take judicial
23 notice of the existence of the existence of a treatment program at a

1 confinement facility but not appropriate to take judicial notice of
2 the quality of the program.

3 Findings of fact and conclusions of law:

4 Government request for judicial notice eight.

5 1. The Joint Resolution Authorizing the Use of Force,
6 107th Congress Public Law 40, is an adjudicative fact capable of
7 accurate and ready determination by resort to sources whose accuracy
8 cannot be questioned. The government has provided the Court with the
9 necessary information under M.R.E. 201(c).

10 2. The Court finds that the JRAUF is relevant evidence for
11 the government to prove who was an enemy for the purpose of the
12 Specification of Charge I and Specification 1 of Charge II. The fact
13 that the JRAUF standing alone does not prove who was an enemy does
14 not detract from its relevance.

15 3. The government motion for judicial notice as
16 adjudicative fact for eight is granted.

17 Conclusions of law:

18 [1.] Defense request for judicial notice of excerpts from
19 David Finkel's book *The Good Soldiers*. As the government does not
20 object, the defense motion for the Court to take judicial notice that
21 David Finkel's book was published prior to the alleged leaks in this
22 case is granted.

1 2. the defense provided the Court with a Washington Post
2 article dated 6 April 2010, by David Finkel describing an excerpt
3 from his book *The Good Soldiers*. Defense did not provide the Court
4 with the video charged in Specification 2 of Charge II to compare
5 with the book or the article to determine whether the excerpt from
6 the book is a verbatim transcript of the video. The defense did
7 provide the Court with that this morning.

8 3. The defense motion for the Court to take judicial
9 notice that Mr. Finkel's book contains a verbatim description of the
10 audio from the video charged in Specification 2 of Charge II is
11 denied.

12 The Court will take notice judicial notice of Mr. Finkel's
13 book and the relative excerpts from the pages of that book should the
14 defense provide the Court with the necessary information. Linkages,
15 argument and legal conclusions regarding the contents of Mr. Finkel's
16 book and the audio and the video are properly presented to the fact
17 finder by the parties, not the Court.

18 Conclusions of law:

19 Defense request for judicial notice of inadequacies with
20 the Distributed Common Ground System-Army, DCGS-A.

21 1. Defense moves the Court to take judicial notice of
22 inadequacies with the DCGS-A, particularly that the DCGS-A system was
23 prone to crashes and incapable of functioning when not connected to a

1 network. The evidence provided to the Court in support of judicial
2 notice does not demonstrate that these facts are generally known
3 universally, locally, or in the area pertinent to the event, or that
4 these facts are capable of accurate and ready determination by resort
5 to resources whose accuracy cannot be reasonably questioned. These
6 facts are not judicially noticeable. During oral argument the
7 defense advised the Court that in the alternative the defense would
8 request the Court to take judicial notice of the enclosures
9 supporting the request for judicial notice, particularly the
10 attachments: a) July 2011, Information Paper by HQDA-DCS-G2,
11 Initiatives Group, DIG; b) Commanders Handbook, Distributed Common
12 Ground System-Army, DCGS-A, dated March 30th 2009; c) Advanced ACE
13 Analytical Capability Joint Urgent Operational Needs Statement, Major
14 General Michael T. Flynn, Deputy Chief of Staff for Intelligence,
15 dated 2 July 2010; d) 19 July 2010, Letter from three members of
16 Congress to the Chairman and ranking members of the House
17 Appropriations Committee; e) 28 July 2010, Letter to the Chairman,
18 House Appropriations Committee from Colonel Peter A. Newell,
19 Director, Rapid Equipping Force; f) 25 August 2010, Letter from
20 Colonel Newell, from Congress members Gabriel Giffords and Adam
21 Smith; g) 23 May 2011, Letter from Adam Smith, Congress member, to
22 General Martin E. Dempsey; h) 29 June 2011, article from Politico,
23 entitled *Computer Bugs for Army Ops*; i) 22 September 2011, article

1 from unknown newspaper entitled *U.S. Army Intel Software Crashes*
2 *During Exercise*.

3 3. The Court will take judicial notice of Attachments A
4 through G. The Court will not take judicial notice of Attachments H
5 and I, both articles rely on anonymous sources and the publisher of
6 Attachment I article is unknown. Both articles demonstrate that
7 these facts -- or excuse me, neither article demonstrates that these
8 facts are generally known, universally, locally, or in the area
9 pertinent to the event or that these facts are capable of accurate
10 and ready determination by resort to resources who's accuracy cannot
11 be reasonably be questioned.

12 4. Any linkages, arguments, and legal conclusions
13 regarding the content of the judicially noted documents are properly
14 presented by the fact finder by the parties not the Court.

15 Ruling:

16 The government motion for judicial notice of Enclosures 1
17 through 8 is granted.

18 The defense motion for judicial notice that David Finkel's
19 book was published prior to the alleged leaks in this case is
20 granted.

21 The defense motion for judicial notice that Mr. Finkel's
22 book contains a verbatim description of the audio from the video
23 charged in Specification 2 of Charge II is denied. The Court will

1 take notice of Mr. Finkel's book and the relevant excerpts from the
2 pages of that book should the defense provide the Court with the
3 necessary information.

4 The defense motion for judicial notice of inadequacies with
5 the DCGS-A particularly that the DCGS-A system was prone to crashes
6 and incapable of functioning when not connected to the network is
7 denied and the alternative motion for defense -- by the defense for
8 judicial notice for Attachments A through I is granted in part. The
9 Court will judicially notice Attachments A through G.

10 So, ordered this 30th Day of August 2012.

11 Does either side have anything further to add with respect
12 to those motions?

13 TC[MAJ FEIN]: No, Your Honor.

14 CDC[MR. COOMBS]: No, Your Honor.

15 MJ: Finally, the Court discussed in the R.C.M. 802 and was also
16 on the record yesterday I believe the motion by the government for
17 court orders to discuss -- to allow the doctors who have treated PFC
18 Manning to answer questions from the government and provide medical
19 records for the Article 13 motion. Does either -- We discussed that
20 briefly, the scope of those orders in the R.C.M. 802 Conference, does
21 either side desire to add anything to the record?

22 ADC[MAJ HURLEY]: Your Honor, during the 802 session the defense
23 objected to the proposed court order that the government provided.

1 These orders the defense believed were too broad. One, they go back
2 to June of 2009, some 6 months prior or before the deployment. And
3 they also go after the time in which PFC Manning was held at
4 Quantico. The defense's position is the government's basis for why
5 they are asking for this information is relevant only if Quantico a)
6 knew about it; or b) the defense offers some evidence that then the
7 government would need to rebut. We believe that the government
8 stated it's basis for rebuttal would be in order to establish some
9 sort of baseline for my client in order to then put into proper
10 context how Quantico treated him and why Quantico responded in
11 certain ways based upon perceived conduct.

12 The defense's position on this is that these orders
13 essentially open up the doors to all of my client's mental health
14 records. That is something the defense believes is not warranted;
15 however, based upon the 802 session the Court is signing the various
16 court orders. The defense only wants to note for the record its
17 objection to that and then also the proposition that even if the
18 government has access to these records obviously they still have to
19 establish independent relevance in order to admit them. And then
20 finally that whatever the government receives they would have to
21 provide to the defense in timely discovery.

22 MJ: All right. Anything from the government?

1 ATC[CPT OVERGAARD]: Yes, ma'am. Just that the defense put the
2 mental health records in issue in their Article 13 motion by writing
3 things that says on Page 77, Paragraph 140, the longer the Brig
4 maintained the POI status the more likely it was that his mental
5 health would deteriorate thus necessitating the POI status. And on
6 Page 79, Paragraph 152, thus in a necessity of protecting him from
7 himself which the defense submits is not what the Brig was actually
8 doing. Confinement facility officials were actually causing PFC
9 Manning psychological harm. And then the footnote, Footnote 15 says,
10 the defense submits that to the extent that there might have been
11 isolated instances of unusual behavior is a direct result of being
12 locked behind bars, starved of all human contact, and watched like a
13 zoo animal for a period of 9 months. And then in Paragraph 9 on Page
14 4, the defense also alleges that during his time in Kuwait PFC
15 Manning's mental health deteriorated. So, all these, Your Honor, put
16 the accused's mental health status in issue before Kuwait and before
17 Quantico. The government would also like to supplement that the
18 defense has removed Lieutenant Commander Moulton from their witness
19 list for Article 13 so the government will not be requesting a court
20 order for that individual any more.

21 MJ: All right. Thank you. Once again, the Court has agreed
22 that the defense -- the accused's mental health records at or before
23 his time in Quantico are relevant and the Court will sign the

1 appropriate court orders once the government gets the Court the court
2 orders with suspense dates for the doctors.

3 Is there anything else we need to address before we proceed
4 today with the litigation on the defense motion for judicial notice
5 for public statements?

6 ADC[MAJ HURLEY]: No, Your Honor.

7 MJ: Yesterday I asked both parties to be prepared to address
8 the issue under regular rules for sentencing under R.C.M. 1001 and
9 under the relaxed rules under R.C.M. 1001(c)(3). Since it is the
10 defense motion?

11 ADC[CPT TOOMAN]: Thank you, ma'am. Ma'am, did you want to go
12 through ----

13 MJ: I want to go through each individual again. I know it's a
14 little bit awkward but I'm going to ask you to do -- you to discuss
15 each individual and then the government can also discuss that. But
16 before we even get to the individuals I would like to go to the
17 argument of admissibility under -- as an adopted admission under
18 M.R.E. 801. I was a little confused. In the motion you had (b).
19 Did you mean (d) in the motion?

20 ADC[CPT TOOMAN]: Well, both, Your Honor.

21 MJ: Well, let's begin with that.

22 ADC[CPT TOOMAN]: Okay. Your Honor, admittedly there is split
23 case law. The government points out in their response that there's -

1 - that the defense position is not supported by any case law and
2 that's not accurate. The circuit courts, there's no military law
3 that I don't think either the government or the defense found on
4 point, and so we looked at the circuits and there is a split. One of
5 the things I think the court reporter just handed you is an
6 additional case, not cited in the government motion but provided to
7 the Court because you may want more reading. The -- It's a -- It's a
8 circuit court, or it's a Maryland case but it's provided to the Court
9 just because it gives kind of an outline of how the circuit courts
10 treat this -- this particular issue. On one side you have sort of
11 the lineage of cases derived from *Santos* which is cited by the
12 government and on the other side you have a lineage of cases derived
13 from *Morgan* which the defense has also provided to the Court. And
14 from there, I think if you look at the *Belamy* case you'll see kind of
15 how the circuit courts have split on this. The defense's position is
16 that you should side with those circuit courts that find that these
17 are admissible or statements from a government agent are admissible
18 as statements against a party opponent. One of the things the *Morgan*
19 Court points out is that the *Santos* decision was made prior to the
20 Federal Rules of Evidence being implemented. So, what the *Morgan*
21 Court says is just look at the rule. Read the rule and the rule
22 doesn't carve out an exception for agent statements for the
23 government. There's no -- There's nothing explicitly said either in

1 the rule itself or in sort of the history of the rule. The
2 discussion is leading up to the implementation of the rules that
3 suggest the government should have an exception to agents by -- or
4 statements by their agents being admissible under that rule. So, the
5 *Morgan* Court says hey, it's not in the rule. It should come in. And
6 from that you have a series of cases cited by the defense in their
7 motion kind of based on that. So, the defense's position is, you
8 know it is not explicitly addressed in the rule, and so the exception
9 that the government, you know, tries to find refuge under should not
10 apply to them. So, the question really becomes -- Question, Your
11 Honor?

12 MJ: Can I stop you for just a moment. You are mentioning the
13 *Belamy* case. Now, I'm looking at your motion. Are we talking it is
14 in your motion from 3 August 2012?

15 ADC[CPT TOOMAN]: No, ma'am, that's -- I apologize for being
16 confusing, this is an additional case. Not cited in the motion.

17 MJ: And do I have it?

18 ADC[CPT TOOMAN]: I believe so. I had given it to the court
19 reporter earlier this morning.

20 MJ: I have a big stack of things that are unmarked that
21 appeared on my desk. Is this it?

22 ADC[CPT TOOMAN]: Right. It's in there, ma'am.

23 MJ: Okay. It's not marked as anything. Are you asking ----

1 ADC[CPT TOOMAN]: It's already been marked, that's just a copy.
2 MJ: Oh, this is my copy. Okay.
3 ADC[CPT TOOMAN]: Yes, ma'am. That's just a copy for you.
4 MJ: Okay. So, this is all new to me this morning, is that what
5 I'm hearing?
6 ADC[CPT TOOMAN]: Yes, ma'am. I thought you might like more
7 reading material.
8 MJ: Okay.
9 ADC[CPT TOOMAN]: The government has been provided with a copy.
10 MJ: All right. And that's appellate exhibit what?
11 ADC[CPT TOOMAN]: 237, ma'am.
12 MJ: Okay.
13 ADC[CPT TOOMAN]: I believe that your copy should be dog-eared
14 to the relevant portion.
15 MJ: Well, I have the cases. I don't have anything that tells
16 me but that's alright. Go ahead.
17 ADC[CPT TOOMAN]: It's on Page 10 of the print on the top, Page
18 10 of 23 is where it begins.
19 MJ: Okay.
20 ADC[CPT TOOMAN]: And so it starts there and it talks about sort
21 of the development of the rules -- the Federal Rules of Evidence and
22 then it kind of goes through for a couple of pages and talks about
23 the way Courts have addressed it. So, the defense's position is, you

1 know, as I noted the rule doesn't say that there should be an
2 exception for the government. There is nothing in the history and
3 admittedly the common law prior to the implementation of the rules
4 was that there was an exception for statements by government agents
5 but that wasn't put in the rule. That's the holding of the *Morgan*
6 Court which was part of the supplemental reading and then ----

7 MJ: Can I ask you a question? Why am I getting this the
8 morning of oral argument?

9 ADC[CPT TOOMAN]: I apologize, Your Honor.

10 MJ: Okay. Go ahead.

11 ADC[CPT TOOMAN]: And so the *Morgan* Court says this doesn't
12 apply, this exception doesn't apply under the rules and then there's
13 a series of cases that follow suit there. And when you look at the
14 *Santos* decision that falls on the other side, the government's side
15 it -- the *Santos* decision and then the *Campelies* decision kind of
16 points to three reasons why the government should have an exception
17 to the rule under 801. One of those is that supposedly government
18 agents are disinterested. They are disinterested parties. They
19 don't care about what happens with, you know, with the litigation.
20 And ----

21 MJ: How do they define government agent?

22 ADC[CPT TOOMAN]: Say again, ma'am?

1 MJ: How do these cases define government agent? I mean can any
2 Joe Blow speak for the government?

3 ADC[CPT TOOMAN]: No, Your Honor. It depends. On some cases
4 it's, uhm, they are referring to statements by the prosecutor. In
5 some -- In some of the cases there is a Sixth Circuit opinion where a
6 field sobriety manual that was produced by the government was
7 admitted as a statement by the government. In another case the AT&T
8 case which admittedly is a civil case, in that case it's statements
9 by members of other agencies. That cased up with the FCC that there
10 were statements made by individuals in other agencies not the FCC and
11 those were found to be admissible. So, it varies.

12 MJ: And that was the AT&T case?

13 ADC[CPT TOOMAN]: Yes, ma'am.

14 MJ: Are there any criminal cases that you are aware of where,
15 and I understand we have a little bit of a unique situation here.

16 ADC[CPT TOOMAN]: Sure.

17 MJ: Where the defense has used statements by a person in agency
18 A, State Department, any Department of Justice, well, I'll take
19 justice out of it. State Department, uhm, the Department of Homeland
20 Security, Department of Health and Human Services, any of those kinds
21 of entities as a statement under this rule?

22 ADC[CPT TOOMAN]: Right, Your Honor. There's nothing
23 specifically on point that, you know, for example in this case where

1 we are looking to admit statements from Secretaries of State and the
2 Secretary of Defense, nothing like that. I would say the closest
3 thing is that Sixth Circuit case which is *Van Griffin* where that's a
4 manual produced by the government.

5 MJ: Okay.

6 ADC[CPT TOOMAN]: So, there's nothing specifically on point.
7 And because of that I think it's important to look at those factors
8 cited by the *Santos* Court when they carved out that exception and the
9 one -- the first one as I mentioned is that the government is
10 allegedly disinterested. That certainly is not the case here, Your
11 Honor. We have on number of occasions heard the government talk
12 about equity holders in this case. By definition an equity holder is
13 someone who is interested. They have stake in the game so to speak
14 and so for the government to argue that these other agencies, the
15 Secretary of -- or the State Department, or certainly anyone within
16 the Department of Defense, any assertion that those folks are
17 disinterested doesn't really carry the water. Additionally the
18 *Santos* Court looks at the ability to bind the sovereign and here
19 again we are talking about high ranking officials whose job it is to
20 speak for the government. Certainly they do have the ability to bind
21 the sovereign. It's not, you know, some random employee from the
22 Department of State, some low-ranking official. This is the
23 Secretary of State making a statement or the Secretary of Defense.

1 And as far as the comments from the Secretary of Defense go the
2 defense would analogize those two the cases that do hold at the
3 Justice Department is a party opponent. So, if you look at the ----

4 MJ: And those cases would be?

5 ADC[CPT TOOMAN]: The *Qatar* case says the Justice Department
6 certainly is a party opponent.

7 MJ: Okay.

8 ADC[CPT TOOMAN]: And so in PFC Manning's situation, it's not
9 the Justice Department that's prosecuting him, it's the Department of
10 Defense so statements from the Department of Defense would be --
11 would be those of a party opponent.

12 There's also some talk of the size of the government and
13 again we're not talking about just random low-level government
14 employee making statements. We think it's telling that these are
15 high-ranking officials who are making statements and because of that
16 they have the ability to bind the sovereign should the court, you
17 know, side with the *Santos* line of thinking I think even when you
18 consider those factors the ability to bind the sovereign, the fact
19 that these aren't disinterested parties even if Your Honor would see
20 the *Santos* line as the correct line, even when you consider those
21 factors we think that these statements would be inadmissible.

22 MJ: How would a statement by a member of congress fit into any
23 of this?

1 ADC[CPT TOOMAN]: Yeah, admittedly, Your Honor, we think that we
2 would have to concede on that that a member of congress would not
3 necessarily be a party opponent. As far as the member of congress I
4 think we would have to -- have to not rely on 801 but probably just
5 not hearsay and not offer those statements for the truth of the
6 matter but rather just because they were statements.

7 MJ: Well how is that relevant?

8 ADC[CPT TOOMAN]: Well, as we talked about yesterday we would
9 request that we be given the opportunity on the merits and during the
10 sentencing to show the relevance.

11 MJ: Okay. Now, yesterday we agreed that this was -- all of
12 this was only relevant on sentencing isn't that correct?

13 ADC[CPT TOOMAN]: Yes, Your Honor.

14 MJ: Okay. Proceed.

15 ADC[CPT TOOMAN]: So, subject to any further questions, Your
16 Honor.

17 MJ: No, since I haven't read the cases yet I don't have any
18 questions. But I understand your argument.

19 ADC[CPT TOOMAN]: And just ----

20 MJ: Is Santos in this stack as well?

21 ADC[CPT TOOMAN]: Santos was cited by the government, Your
22 Honor.

23 MJ: Okay. Okay. Got it.

1 ADC[CPT TOOMAN]: There's also -- I did reference it just now
2 but there is also a law review article that I put in there from
3 Professor Imwahelreid which discusses those Santos factors.

4 MJ: All right. Thank you.

5 ADC[CPT TOOMAN]: Thank you, Your Honor.

6 MJ: Captain Morrow?

7 ATC[CPT MORROW]: Just a couple of notes, Your Honor. I think
8 when you started you asked about subsection b.

9 MJ: Yes.

10 ATC[CPT MORROW]: You asked the defense counsel about subsection
11 b and I think we are confusing the issues here. In the line of cases
12 cited by the defense I'll just, you know, briefly read subsection b
13 about the Military Rule of Evidence 801(b)(2), a statement is not
14 hearsay if the statement is offered against the party and it is a
15 statement in which the party has manifested, the parties adoption or
16 belief that it's true. So, under the line of cases cited by the
17 defense the only time that the courts ----

18 MJ: Can I just stop you. Did you say 801(b) or 801(d)?

19 ATC[CPT MORROW]: 801(d)(2). I say subsection b because it's
20 801(d)(2)(b) and 801(d)(2)(d).

21 MJ: Okay. Just for clarification are those the subsections
22 that the defense is relying on because the defense motion says
23 801(b)?

1 ADC[CPT TOOMAN]: Yes, that's a typo, Your Honor, it should be
2 d.

3 MJ: So it is 801(d)(2)(b) and (d)(2)(d) is what you are relying
4 on. Okay. Yes. Go ahead, I'm sorry Captain Morrow.

5 ATC[CPT MORROW]: Okay. So, in the line of cases under that the
6 defense noted it is under subsection d. So we are talking about when
7 a party and in this line of cases the party is always the
8 prosecution. So the prosecution has adopted some fact in another
9 criminal case. So, for example if there was a related case, you
10 know, a related court-martial, you know, I don't know, a co-
11 conspirator of the accused or something and in that court-martial the
12 prosecution entered into a stipulation of fact or, actually argued in
13 opening statement or closing argument a particular position that
14 position or that argument may be adopted against the party and then
15 in this case. Does that make sense?

16 MJ: Yes, yes.

17 ATC[CPT MORROW]: So, that line of cases only refers to that
18 scenario where the actual -- where the DoJ or the -- or the
19 prosecutor, like the *Belamy* case cited by the defense, it was the
20 State's Attorney's Office and a related cases adopted a position that
21 was later used against or that they later objected to be using
22 against them in the *Belamy* case and the Court found that, obviously,
23 if they adopted -- if they adopted some fact in another related case

1 then yes, that could be used against the prosecution as admission of
2 a party opponent.

3 MJ: Why wouldn't that same rationale apply in sentencing in
4 this case if there are senior level public officials that are making
5 statements on behalf of the government?

6 ATC[CPT MORROW]: One because in this case, Your Honor, I don't
7 think they -- the government would not concede that the senior
8 officials -- we haven't adopted the truth of those statements.

9 MJ: So, the prosecution's position ----

10 ATC[CPT MORROW]: We have to adopt ----

11 MJ: ---- is at odds that we don't agree with ----

12 ATC[CPT MORROW]: Well it may be, I don't ----

13 MJ: ---- Secretary Gates and Secretary Clinton?

14 ATC[CPT MORROW]: The prosecution's position is that the
15 statements are incomplete. So, yes, they are at odds with the
16 position of the government.

17 MJ: All right. The government could call these witnesses and
18 complete those statements couldn't they?

19 ATC[CPT MORROW]: They could, Your Honor, yes. I mean the
20 government's position is that many of those statements were made --
21 well, first of all many of the statements were made to reporters,
22 they weren't statements, you know, they weren't statements, you know,
23 they weren't testimony -- congressional testimony. This wasn't a

1 prepared letter. In many cases this was just statements to a
2 reporter in response to a question. So, you know, it's a much
3 different situation then what the line of cases has dealt with
4 previously.

5 MJ: Okay.

6 ATC[CPT MORROW]: So that sort of addresses the b argument.
7 So, the government's position in that case, you know, is these are
8 not admissible under b because the prosecution has not adopted those
9 facts or adopted or believe in those statements. As for addressing
10 the defense argument in d, you -- of course the defense cited in
11 their -- really the seminal case if you want to call it that is the
12 AT&T case where the Court said, okay, these executive branch agencies
13 who testified in a proceeding before the FCC, those statements could
14 be used against the plaintiff, the United States in that case as
15 admissions of a party opponent under the d subsection. So, they are
16 agents of the government. But again that was an FCC, so Federal
17 Communications Commission hearing in an anti-trust case against AT&T.
18 So, again there are some, at least in that case there was some
19 emphasis between the two parties. But this -- that sort of -- that
20 line has never been adopted in the criminal context.

21 MJ: Okay. But why shouldn't it be?

22 ATC[CPT MORROW]: Well, again, I think that goes back to sort of
23 the -- the manner in which the statements were made, you know,

1 Secretary Clinton in sitting down with reporters on a plane to
2 wherever she is going, she's answering questions, that's not the type
3 of statement that -- I don't think is contemplated in this rule.
4 It's certainly, I mean, there are other reasons why I think the
5 government would object to that particularly in the sense that we are
6 not really -- if it is not on paper or if it is not reported or for
7 whatever reason, you know, it is hard to determine whether the
8 statement is a reliable statement.

9 MJ: Well it's hearsay within hearsay ----

10 ATC[CPT MORROW]: Yes.

11 MJ: ---- because it is coming out of the newspaper. The
12 defense has asked me to take judicial notice of the statements. I
13 mean is it the government's position that these statements, I
14 understand that they may not be complete but is it the government's
15 position that they weren't made?

16 ATC[CPT MORROW]: No. And in fact we conceded at least that the
17 fact that the statement was made could be judicially noticed but
18 again, the content of the statement the government would ask the
19 Court to deny its admissibility on the content. And there -- In the
20 government's motion there are certain -- we -- we specifically did
21 not object to certain statements.

22 MJ: That's where I'm confused. I thought you told me yesterday
23 you did.

1 ATC[CPT MORROW]: Right, and some of the statements we didn't,
2 Your Honor.

3 MJ: Okay. Again, maybe I'm confused, it won't be the first
4 time. I thought you told me yesterday -- I understand you have the
5 motion here, it says that United States does not object to the Court
6 taking judicial notice that statements were made. I mean if I take
7 judicial notice that these people made statements and I don't tell
8 the fact finder what the statement says, I don't really see the
9 point.

10 ATC[CPT MORROW]: Well, that's sort of -- that's sort of -- the
11 defense is proffering, you know, they want the Court to take judicial
12 notice of something. The government, you know, we are not
13 necessarily conceding the relevance of that. If the Court decides to
14 go that direction if the Court takes judicial notice that a statement
15 was made of course the defense would have to proffer some reason why
16 that's relevant to something, to some fact in issue.

17 MJ: Well, in a sentencing case would a statement by a senior
18 government official involved in saying that the leaks weren't quite
19 that damaging, would that not be mitigation?

20 ATC[CPT MORROW]: That might be mitigation, Your Honor, if you
21 accept that the contents of the statement is admissible but the fact
22 that the statement was made, again, I suppose that they could -- I
23 don't want to make a defense argument.

1 MJ: I guess then, so the government's position is you don't
2 object to me taking judicial notice that public officials made
3 statements so long as I don't tell the members what the statements
4 were?

5 ATC[CPT MORROW]: That's correct, Your Honor, certain
6 statements.

7 MJ: But you do object to the content of the statement?

8 ATC[CPT MORROW]: Yes, Your Honor.

9 MJ: Okay.

10 ATC[CPT MORROW]: Sorry. I didn't mean to confuse you, Your
11 Honor, there's just ----

12 MJ: I guess -- I mean taking judicial notice that persons a, b,
13 c, d, and e made statements ----

14 ATC[CPT MORROW]: I agree, Your Honor.

15 MJ: All right. So, I think we -- at issue is whether I am
16 going to take judicial notice of the content of the statement?

17 ATC[CPT MORROW]: I think so. And if you want to -- if the --
18 yes. To narrow the issue, yes, that is the -- that is the relevant
19 issue.

20 MJ: Okay. And the government doesn't -- There is no -- None of
21 these statements the government is agreeing that I should take
22 judicial notice of?

1 ATC[CPT MORROW]: Under relevant case law the government's
2 position is that none of those statements are admissible as
3 admissions of a party opponent under 801(d)(2)(b) or 801(d)(2)(d).

4 MJ: Okay. Now, again, let's go into sentencing and I'll ask
5 the defense the same question. In the Military Rules of Evidence --
6 under the Military Rules of Procedure in R.C.M. 1001(c)(3) that rule
7 authorizes the military judge with respect to matters in extenuation
8 or mitigation or both to relax the rules of evidence. This may
9 include admitting letters, affidavits, certificates of military and
10 civil officers or other writings of similar authenticity and
11 reliability. R.C.M. 1001(c)(4) provides under the Rules of Evidence
12 have been relaxed for the defense, they may be relaxed during
13 rebuttal, sur-rebuttal to the same degree. Now, what is the
14 government's position regarding the content of these statements
15 should the rules be relaxed?

16 ATC[CPT MORROW]: The government had an opportunity to do a
17 little bit of research this morning, Your Honor, and the government
18 would like the ability to brief the issue more fully but at this time
19 our position is that the -- even when the Rules of Evidence are
20 relaxed the military judge must still make some finding that the
21 evidence is authentic, reliable, and relevant. So, yes, the rules
22 are relaxed but there has to be some baseline authenticity or
23 reliability to the statement. And so along with that hearsay, just

1 based on some limited research we've done this morning, hearsay in
2 some cases has been admitted under some circumstances but that
3 hearsay can't be too far removed from the source. So, for example
4 you cited sort of the hearsay within hearsay issue we have in this
5 case where it's a public statement of some official reported in x
6 periodical and so we are sort of getting too far removed from the
7 source in that case.

8 MJ: Just for an example ----

9 ATC[CPT MORROW]: All the -- I can give you an example to this
10 morning the defense handed me two letters, you know, one of which was
11 a letter from 16 August 2010, letter from Secretary Gates to Senator
12 Levin. You probably don't have it, Your Honor.

13 MJ: I do have it. This is the letter that's referenced in the
14 articles?

15 ATC[CPT MORROW]: Yes, ma'am. And we objected in our motion
16 because the letter actually wasn't enclosed as evidence in the motion
17 but this morning the defense provided the letter. But in this case,
18 yes, I mean, of course the government sees this as authentic,
19 reliable letter from Secretary Gates to Chairman Levin, but that's
20 sort of a discrete example of where -- in that case the Court could
21 conceivably if the Rules of Evidence were relaxed take judicial
22 notice of hearsay.

1 MJ: Well, why couldn't -- even if the Rules of Evidence were
2 not relaxed with this particular letter on 16 August 2010, what would
3 the government's objection to my taking judicial notice, the defense
4 hasn't asked me but just hypothetically?

5 ATC[CPT MORROW]: Well, the government's position would be it's
6 hearsay.

7 MJ: Would it be a business record?

8 ATC[CPT MORROW]: Perhaps, Your Honor.

9 MJ: Well you were just handed this this morning as well, right?

10 ATC[CPT MORROW]: Yes, ma'am.

11 MJ: Okay. And then there is a second letter here apparently.

12 ATC[CPT MORROW]: The first letter is from Senator Levin to
13 Secretary Gates asking for answers to specific questions.

14 MJ: Okay. All right. So, in your scenario then under the
15 relaxed Rules of Evidence the government's position is that none of
16 this comes in?

17 ATC[CPT MORROW]: Under the relaxed Rules of Evidence?

18 MJ: Yes. Or you said you would like an opportunity to brief
19 the issue?

20 ATC[CPT MORROW]: We would like the opportunity to brief the
21 issue. Admittedly our research was rather limited this morning but
22 assuming the hearsay for example, like for example the letter
23 assuming that's -- the Court find that it's -- it meets baseline

1 centers of relevance, reliability, and authenticity that's the type
2 of statement that likely could be admitted against the government in
3 sentencing. Assuming the Rules of Evidence were relaxed.

4 MJ: All right. Thank you.

5 ATC[CPT MORROW]: Any other questions, Your Honor?

6 MJ: No. Defense, I have a couple for you. There -- The
7 request for judicial notice included statements from former Secretary
8 Robert Gates to the -- in an Associated Press article dated 15
9 October 2010, taken from a 16 August 2010, letter to Senator Carl
10 Levin which I now have a copy of.

11 ADC[CPT TOOMAN]: Yes, ma'am.

12 MJ: And number 4 I don't think number -- or excuse me, so, one
13 of the things in the defense notice that concerned me is the defense
14 wanted me to take judicial notice of statements -- part of the
15 statement, not the whole statement even in the articles. Is the
16 defense now asking me to take judicial notice of the letter?

17 ADC[CPT TOOMAN]: Yes, we would ask you to take judicial notice
18 of the letter, Your Honor.

19 MJ: In place of the article ----

20 ADC[CPT TOOMAN]: Yes, Your Honor.

21 MJ: ---- which had snippets?

22 ADC[CPT TOOMAN]: Yes, ma'am.

1 MJ: All right. So, this takes care of -- or this would be in
2 replacement of the Associated Press article. Is that correct?

3 ADC[CPT TOOMAN]: Yes, Your Honor.

4 MJ: But it would not be for the New York Times comments on November
5 30th -- 30 November 2010. Is that right?

6 ADC[CPT TOOMAN]: Correct, Your Honor, but I don't think that
7 would be necessary. If you would ----

8 MJ: Well, let me ask you this. When I went through the defense
9 motion as I said there are parts of what these people said in these
10 articles that you want me to take judicial notice of.

11 ADC[CPT TOOMAN]: Correct.

12 MJ: I'm either going to take judicial notice of everything they
13 said in the article or nothing they said in the article. Does the
14 defense still want me to go forward and look at everything they said
15 in the article that's relevant to this case?

16 ADC[CPT TOOMAN]: Yes, Your Honor.

17 MJ: Do you see what I mean? If they say sentence one and then
18 they've got sentence two and sentence three and you only want me to
19 take judicial notice of sentence one, I'm not going to do that.

20 ADC[CPT TOOMAN]: Understood, Your Honor.

21 MJ: Because then my -- Captain Morrow [SIC], we are really
22 getting far-afield here.

23 ADC[CPT TOOMAN]: Understood, Your Honor.

1 MJ: What is the defense's position on the admissibility of the
2 letter as well as the statements under M.R.E. or R.C.M. 1001 with
3 relaxed rules and without relaxed rules.

4 ADC[CPT TOOMAN]: Well, Your Honor, I think without relaxed
5 rules we've addressed that. We do think they are admissible as
6 statements of a party opponent or ----

7 MJ: Well how about the hearsay within hearsay because they are
8 out of a newspaper so the person writing the newspaper article is the
9 hearsay piece first?

10 ADC[CPT TOOMAN]: Correct, Your Honor. Could I have a moment?

11 MJ: Yes.

12 ADC[CPT TOOMAN]: Your Honor, for the first hearsay, the actual
13 statement, the words coming out of the mouth, that would be the
14 statement by the party opponent and then the printing of it in the
15 newspaper we would look to the business records exception.

16 MJ: All right. And do you have any authority to support that
17 at this point?

18 ADC[CPT TOOMAN]: Not at this point, Your Honor.

19 MJ: Okay. I'm looking at the clock here. My initial idea
20 coming into court today was to have the parties argue this motion and
21 I hope to have a ruling this afternoon before we ended today. I now
22 have a stack of new materials from the defense. I have the
23 government wanting to brief the issue of relaxed and unrelaxed rules.

1 I'm thinking once again, I know we tabled this from yesterday to
2 today, but I really don't want to do this motion piecemeal and I'd
3 like to do it fully appraised by the parties of the issues. So, what
4 I would like for -- well, our next session isn't until the 15th and
5 16th of October but again, this is sentencing evidence so unless
6 either side has a strong objection to litigating this earlier, I
7 would like additional briefs by the parties on this issue, primarily
8 with respect to, I think, both side's analyst on the new cases that I
9 got today from the defense, the admissibility of these statements
10 under Military Rule of Evidence 801(d)(2)(b) and (d), the hearsay
11 within the hearsay issue and business records for a newspaper
12 article, and any other issues either side -- and the admissibility
13 under the relaxed rules of sentencing and the non-relaxed rules. And
14 is there anything that I've not addressed that the parties would like
15 me to look at when I look -- when I make a ruling on this issue?

16 ADC[CPT TOOMAN]: Your Honor, additionally the defense would
17 potentially offer these for a non-hearsay purpose so not for the
18 truth of the matter asserted, so taking notice of statements that
19 were said and the actual content of the statement but not ----

20 MJ: How would it not be offered for the truth of the matter
21 asserted? What would be its relevance?

22 ADC[CPT TOOMAN]: Well, it would still be relevant because a
23 government official made the comment.

1 MJ: But the relevance is what he said, which goes to the truth
2 of the matter asserted.

3 ADC[CPT TOOMAN]: Right, well, taking that position the
4 government would certainly be able to rebut if they wanted to put
5 forth evidence that says this isn't the truth.

6 CDC[MR. COOMBS]: If I may, for one moment, Your Honor?

7 MJ: Yes.

8 CDC[MR. COOMBS]: The issue -- A good example would be Secretary
9 of State Clinton when she made a statement that on her tour of the
10 various countries that diplomatic cables were released to, these
11 individuals said to her, hey, look, this is not going to affect our
12 relations. We are still going to talk to you. We are not going to
13 hold back anything from a diplomacy standpoint. She says that
14 statement. We are -- We are not necessarily offering that statement
15 for the truth that in fact Libya -- whatever country is not going to
16 hold back on its diplomacy with the United States. We are offering
17 it for the fact that it was said. So, in that instance it wouldn't
18 matter to the defense at all that what Secretary Clinton said was
19 true that country x is not going to hold back. What would matter is
20 that Secretary Clinton said it. So that would be a non-hearsay
21 purpose that would still have relevance.

22 MJ: All right I would like the parties to brief that issue as
23 well. So, it would be the -- in final then, the new brief, your

1 supplemental brief would be and the admissibility under Military Rule
2 of Evidence 801(d)(2)(b) and (d), addressing the new defense cases
3 that were supplied, the hearsay within hearsay, newspapers as a
4 business record, I'll add one more in there whether there is any case
5 law if any courts have taken judicial notice of newspaper articles,
6 and the issue of not being offered for the truth of the matter
7 asserted, and admissibility under M.R.E. or R.C.M. 1001 without
8 relaxed rules and admissibility under M.R.E. [sic] 1001(3)(c) under
9 the relaxed rules.

10 Is there any issue that I have not, or any legal matter I
11 have not raised that the parties believe should be briefed to the
12 Court?

13 ADC[CPT TOOMAN]: Your Honor, we would also like to brief the
14 Court on Rule 807, residual hearsay.

15 MJ: All right. That's fine. Captain Morrow?

16 ATC[CPT MORROW]: Yes, ma'am, with respect to the admissibility
17 of statements for a non-hearsay purpose, I guess the government would
18 brief in sort of a vacuum. I mean what's -- for every statement
19 what's the non-hearsay purpose? Normally the defense would proffer
20 that, the government would respond to that proffer.

21 MJ: Okay. Well, why don't we do the filing the same way we did
22 before then, we'll have the defense file and for each of the

1 statements that you want to be admissible -- let me ask you something
2 here on the, just one thing on the congressman.

3 ADC[CPT TOOMAN]: Yes, Your Honor.

4 MJ: Does the defense really want judicial notice of that
5 statement -- of the congressman under the rules that you just
6 described?

7 ADC[CPT TOOMAN]: One moment, please. Your Honor, we would like
8 to brief that as well.

9 MJ: All right. Go ahead. As I see that as a different
10 category.

11 ADC[CPT TOOMAN]: It's a separate issue.

12 MJ: So, I guess what then the defense will do or both sides
13 will do will brief generically and then defense if you would go, you
14 know, statement by statement and what you are proffering it under and
15 how you get there.

16 ADC[CPT TOOMAN]: Yes, ma'am.

17 MJ: Okay. Government?

18 ATC[CPT MORROW]: Your Honor, for the scheduling purposes on
19 that the session would be for the next session, 17 to 19 October?

20 MJ: That's 17 and 18 October.

21 ATC[CPT MORROW]: Sorry, 17 and 18 October, 2 weeks from today
22 just going into the regular cycle that we've used before would be the
23 defense's essentially supplemental motion on the 13th of September

1 and then we could do a government response 2 weeks later on the 27th
2 of September. The first was the 13th of September, Your Honor.

3 MJ: Okay. So, 13 September?

4 ATC[CPT MORROW]: Would be the defense's essentially
5 supplementary motion. The government's response on the 27th of
6 September would be 2 weeks later. One week later instead of 5 days,
7 4 October would be any reply by the defense and that would then give
8 the Court one and a half weeks before the 17th.

9 MJ: Defense, any objection to that timeline?

10 ADC[CPT TOOMAN]: No, ma'am.

11 MJ: Okay. I think this is a better approach. I mean right now
12 I've got too many new things to be able to intelligently make a
13 ruling this afternoon. So, we will go ahead and have that placed on
14 the court calendar as well for the next session on the 17th and 18th
15 of October.

16 ATC[CPT MORROW]: Yes, Your Honor.

17 MJ: Is there anything else that we need to address for this
18 Article 39(a) session? Why don't we take a brief recess and come
19 back on the record. Is 10 minutes sufficient for both sides?

20 ADC[CPT TOOMAN]: Yes, Your Honor.

21 TC[MAJ FEIN]: Yes, Your Honor.

22 MJ: All right. Let's take a brief recess and if the parties
23 would just come back and talk to me quickly before we go back on the

1 record, let's make it a 15-minute recess. We'll come back at 1130.
2 If the parties will just come back and talk to me briefly if there
3 are any issues that we need to address remaining here at this
4 session. Court is in recess.

5 **[The Article 39(a) session recessed at 1115, 30 August 2012.]**

6 **[The Article 39(a) session was called to order at 1131, 30 August**
7 **2012.]**

8 MJ: This Article 39(a) session is called to order. Let the
9 record reflect all parties present when the Court last recessed are
10 again present in court.

11 During the recess I asked the parties to confer and see if
12 there was anything else we needed to address before the Court. I
13 asked them to come back in my chambers and they advised me that they
14 would like to add some additional information on the record. Who
15 wants to start?

16 ADC[MAJ HURLEY]: I will, Your Honor. The government has
17 indicated based upon our 505(h)(3) notice that there perhaps is some
18 language in there that they're not for sure it is specific enough.
19 We have agreed that the general language that says, "in general" is
20 not referencing some other information. We have given them the exact
21 statements or the exact information we intend to elicit. We've
22 agreed though in order to insure there's no confusion we'll go

1 through one of the documents and highlight exactly what we intend to
2 elicit from witnesses. So, that's one issue.

3 The second issue is providing the government with notice as
4 to what information we intend to elicit from witness interviews. In
5 particular the government's witness list they've listed several
6 witnesses that they are going to call during the merits portion. We
7 intend to go question them but in order to give the government the
8 required notice under the protective order we need to first have some
9 sort of proffer from the government similar to an R.C.M. 703 proffer
10 as to why that witness is being called. That in turn will dictate
11 what we intend to question them about. The government during the 802
12 session has agreed to provide that documentation. The one section of
13 witnesses that I think this will be the most at play will be the
14 Department of State. The government has 22 separate Department of
15 State witnesses. I've tried to coordinate with the Department of
16 State in order to gain access to each of those individuals. I did so
17 on numerous occasions, two requests, and now 2 weeks ago contacting
18 their general counsel asking in order to set up times that are
19 convenient for them in order to interview them. I haven't heard
20 anything back, but the government again, has indicated that they will
21 help facilitate that process.

22 MJ: All right. Thank you. Government?

1 TC[MAJ FEIN]: Your Honor, the government agrees with the update
2 on that M.R.E. 505(h)(3) notice, specificity -- in providing us the
3 specificity is what require only so we can go get the approvals or
4 not and figure out the next step. So, we will follow that process.
5 As far as the prosecution witness list, that was accurate. The
6 government does agree for judicial economy and to speed up the
7 process the government will provide the defense with a brief
8 explanation of what the government intends or why the government
9 intends to call each witness for what either specification or what
10 major grouping of facts so it gives the defense notice of what
11 classified information would or would not be elicited

12 MJ: All right. Thank you. Is there anything else we need to
13 place on the record today?

14 CDC[MR. COOMBS]: No, Your Honor.

15 TC[MAJ FEIN]: No, Your Honor.

16 MJ: Court is in recess.

17 **[The Article 39(a) session recessed at 1135, 30 August 2012.]**

18 **[END OF PAGE]**

Pages 1956 through 1968 of this transcript are classified “SECRET”. This session (2 October 2012, Session 1) is sealed for Reasons 2, 3, and 4, Military Judge’s Seal Order dated 17 January 2014 and stored in the classified supplement to the Record of Trial.

Pages 1969 through 2014 of this transcript are classified “SECRET”. This session (12 October 2012, Session 1) is sealed for Reasons 2, 3, and 4, Military Judge’s Seal Order dated 17 January 2014 and stored in the classified supplement to the Record of Trial.

1 [The Article 39(a) session was called to order at 1026, 17 October
2 2012.]

3 MJ: This Article 39(a) session is called to order.

4 Major Fein, please account for the parties.

5 TC[MAJ FEIN]: Your Honor, all parties present when the court
6 last recessed are again present with the following exceptions:
7 Captain Overgaard is not present; Captain Whyte is present; also
8 Staff Sergeant Foy is not currently court reporter, although he's
9 sitting second chair for court reporting, and Staff Sergeant Richard
10 Chavez, from the Military Commissions, is here and previously sworn.

11 MJ: All right, thank you.

12 All right, we're going to begin today by going over some
13 of the matters that have occurred since the last Article 39(a)
14 session, which was the last week of August of 2012. One of the
15 issues at that session was a Defense Motion to Compel #3, which
16 involved e-mails that were preserved from the Quantico -- Marine Base
17 Quantico Correctional Facility, and the defense filed a motion to
18 compel. There were approximately 1,290 e-mails. The government had
19 initially disclosed 84 of those e-mails to the defense, and then
20 subsequently during the Article 39(a) session that we held last time
21 also disclosed an additional 600 of those e-mails and the court took
22 the additional approximately 700 e-mails for *in camera* review. What

1 that means is I review them in chambers and make a decision on which
2 of those e-mails gets released to the defense.

3 On 14 September, after reviewing each of those 700,
4 approximately, e-mails, the court ruled as follows -- first of all,
5 was that ruling marked as an appellate exhibit?

6 TC[MAJ FEIN]: Yes, Your Honor. It's marked as Appellate
7 Exhibit 317.

8 MJ: All right. And I believe, Counsel, if I'm not incorrect,
9 that the prosecution -- or the defense motion to compel and the
10 prosecution responses were marked at the last Article 39(a) session;
11 is that correct?

12 CDC[MR. COOMBS]: That is correct, Your Honor.

13 TC[MAJ FEIN]: Yes, Your Honor.

14 MJ: Okay. So Appellate Exhibit 317 is the court's ruling,
15 and it is as follows:

16 At issue before the court is a defense motion to compel
17 the government to produce that portion of 1374 e-mails regarding the
18 accused's confinement at Marine Base -- Corps Base Quantico that has
19 not been disclosed to the defense. The government has disclosed
20 approximately 684 of the e-mails to the defense. Some of the
21 remaining e-mails are illegible.

22 The government opposes release of the undisclosed e-mails
23 to the defense on the grounds that they are not relevant or material

1 to the preparation of the defense because they (1) address public
2 affairs matters, to include discussions of media articles and
3 preparation of responses to media inquiries, including responses to
4 media reports by the *New York Times* and *Frontline*; (2) protestors at
5 Marine Corps Base Quantico, to include discussions of upcoming
6 protests, the number of protestors, and plans to respond to the
7 protestors; (3) discussions of operational impact on the Pretrial
8 Confinement Facility at Marine Corps Base Quantico based on projected
9 detainees, the Defense Base Realignment and Closure
10 Commission (BRAC); (4) providing and funding mental health
11 professionals, to include discussion of the extent of each Service's
12 financial obligations; (5) administrative coordination, to include
13 ensuring detainees, including the accused, had the proper uniform;
14 (6) discussion of the accused's, quote, chasers; (7) discussions of
15 the definitions of Marine Corps Base Quantico's regulations regarding
16 visits and statements of changes the accused made to his visitation
17 list; (8) editing drafts of proposed documents, to include proposed
18 responses to media queries -- inquiries; (9) discussions of visits of
19 officials to Marine Corps Base Quantico unrelated to the accused; and
20 (10) discussions of complying with Health Insurance Portability and
21 Accountability Act (HIPPA). The government has not asserted a
22 privilege regarding the disclosure of the e-mails.

1 On 28 August 2012, the court ordered the government to
2 produce the undisclosed legible e-mails to the court for *in camera*
3 review in accordance with Rule for Court-Martial 701(g). The court
4 has conducted an *in camera* review of the undisclosed il -- legible
5 e-mails, excuse me, and rules as follows:

6 Order: Not later than 18 September 2012, the government
7 shall disclose all of the undisclosed legible e-mails to the defense
8 except the following e-mails listed by Bates numbered pages which
9 either refer to the subject matter unrelated to U.S. v. Manning or
10 are not material to the preparation of the defense or relevant to the
11 Article 13 motion pending before the court. And I list approximately
12 12 Bates numbers.

13 So ordered this 14th day of September in chambers.

14 And Appellate Exhibit 325 is an 18 September 2012
15 notification to the court for Quantico e-mails.

16 Major Fein, would you like to address that?

17 TC[MAJ FEIN]: Yes, ma'am. Ma'am, Appellate Exhibit 325 is the
18 prosecution notice to the court that on 18 September the United
19 States disclosed all of the undisclosed legible e-mails to the
20 defense except the e-mails listed by what the court's -- the court
21 references as "Bates numbers." Further in this notification we just
22 clarified that although we did provide unique identifying numbers,
23 they actually weren't the Bates numbers we use in discovery, and we

1 did still comply with the court's order, just we renumbered the pages
2 and gave those to the defense.

3 MJ: All right, so my understanding from what you're saying
4 even though I termed the numbers that I list in the order as "Bates
5 numbers", the government understood what they were.

6 TC[MAJ FEIN]: Yes, ma'am. They were administrative control
7 numbers that we gave the court and then we turned around and produced
8 those documents with Bates numbers. We used the term "Bates numbers"
9 in this case only for documents that the prosecution has actually
10 disclosed to the defense and what the defense discloses to the
11 prosecution.

12 MJ: All right.

13 Mr. Coombs, do you have anything to add?

14 CDC[MR. COOMBS]: No, Your Honor.

15 MJ: All right.

16 Anything -- so I assume we don't have anything else to
17 address with that issue.

18 CDC[MR. COOMBS]: That is correct, Your Honor.

19 TC[MAJ FEIN]: Yes, ma'am.

20 MJ: All right, I have received some additional notifica -- an
21 additional notification from the government with respect to court
22 questionnaires. There are apparently 24 potential court members that

1 -- or alternates that have not yet answered the questionnaire and the
2 notice to the court was for the reasons why.

3 Is there -- does either side desire to address that?

4 TC[MAJ FEIN]: Your Honor, I think that's pretty adequate. We
5 are still getting the updates and I think we are at about an 80-
6 percent level and should have the rest in the next 2 weeks.

7 MJ: All right, and that notification to the court is
8 Appellate Exhibit?

9 TC[MAJ FEIN]: 328, Your Honor.

10 MJ: All right.

11 At the last Article 39(a) session, the government had
12 asked the court to sign some court orders for mental health
13 professionals that have been involved in this case to [pause] ----

14 TC[MAJ FEIN]: Yes, Your Honor. Originally those were
15 previously marked as appellate exhibits. During the last session,
16 they were marked as Appellate Exhibits 287 -- excuse me, Your Honor,
17 288. There's a lot of exhibits here, Your Honor, and court orders.
18 The mental health professional court orders start at 289 through 300.

19 MJ: And those were the mental health orders that I signed at
20 the last session; is that correct?

21 TC[MAJ FEIN]: That is correct, Your Honor.

22 MJ: And the -- since that session, the government presented
23 the court with additional court orders to Dr. Kevin Moore, Dr.

1 Kenneth Deherrera, Dr. Peter Resweber, Dr. Joseph Gretsch, Dr. Edan
2 Critchfield, Dr. Martin Leibman, Captain Michael Worsley, Lieutenant
3 Colonel Rolanda Colbert, and Dr. David Hutcheson-Tipton, and those
4 have been marked as Appellate Exhibit 304 through 315, and the
5 government requested that the court sign similar court orders for
6 those professionals, the defense did not object, so the court did
7 sign those orders on the 11th of September, 2012, with a suspense
8 date of 28 September 2012 for each of those.

9 TC[MAJ FEIN]: Your Honor, a correction on the appellate -- the
10 appellate exhibit numbers. We're tracking those were marked as
11 Appellate Exhibits 307 through 315.

12 MJ: All right, if I didn't say that, I thought I did, but I
13 concur with the government.

14 TC[MAJ FEIN]: Yes, ma'am.

15 MJ: And the government, then, provided notification to the
16 court on the 28th of September, 2012, that all relevant individuals
17 have complied with the court orders that I signed on the 30th of
18 August, 2012, and the 11th of September, 2012, and that would be at
19 Appellate Exhibit 332.

20 TC[MAJ FEIN]: Yes, ma'am.

21 MJ: Does either side have anything further to add with
22 respect to mental health professionals?

23 TC[MAJ FEIN]: No, Your Honor.

1 CDC[MR. COOMBS]: No, Your Honor.

2 MJ: On the 14th of September, the government filed for *in*
3 *camera*, *ex parte* -- an *in camera*, *ex parte* motion for authorization
4 of redactions of Department of State records under Military Rule of
5 Evidence 505(g)(2) and Rule for Court-Martial 701(g)(2); and I
6 believe there were also -- there's also an additional filing for a
7 redaction of material within one Department of Homeland Security
8 document under Rule for Court-Martial 701(g)(2), also filed on the
9 14th of September, 2012; and a government *in camera* motion for
10 authorization of a summary of CIA information under Military Rule of
11 Evidence 505(g)(2); as well as another motion for *in camera* and *ex*
12 *parte* authorization for redactions of FBI -- the FBI investigation
13 under Military Rule of Evidence 505(g)(2) and Rule for Court-Martial
14 701(g)(2).

15 Have all of those documents been marked as appellate
16 exhibits?

17 TC[MAJ FEIN]: Yes, Your Honor, and if you'd like, I'll go
18 through each one ----

19 MJ: Yes, please.

20 TC[MAJ FEIN]: ---- briefly.

21 MJ: And the defense also filed an opposition to all of those
22 motions.

23 TC[MAJ FEIN]: Yes, ma'am.

1 Ma'am, first, on 14 September 2012, the government filed
2 a 505(g)(2) motion for authorization for substitutions or redactions
3 of Department of State documents. The original *ex parte* motion has
4 been marked as Appellate Exhibit 301; included with that, because it
5 was filed unclassified, there were two separate enclosures that were
6 filed specifically *ex parte* and those have been also -- or fall under
7 Appellate Exhibit 301.

8 Additionally, Your Honor, on 14 September, what has been
9 marked as Appellate Exhibit 319 is the government's disclosure to the
10 defense of that -- the redacted and unclassified portions of that *ex*
11 *parte* filing; again Appellate Exhibit 319.

12 Next, Your Honor, on the same day, September 14th, 2012,
13 the government filed R.C.M. 701(g)(2) *ex parte* filing for an *in*
14 *camera* review of a Department of Homeland Security document and that
15 was -- that motion has been marked as Appellate Exhibit 320; and on
16 the same day the government provided a unclassified redacted version
17 pursuant to the court's order to the defense and that has been marked
18 as Appellate Exhibit 321.

19 MJ: Okay, let me get those.

20 TC[MAJ FEIN]: Yes, ma'am.

21 **[The court reporter handed appellate exhibits to the military judge.]**

22 MJ: All right, I have Appellate Exhibits 320 and 321.

23 TC[MAJ FEIN]: Yes, ma'am.

1 Additionally, on the 14th of September, what has been
2 marked as Appellate Exhibit 322, the government filed its M.R.E.
3 505(g) (2) motion for authorization of substitutions or redactions for
4 CIA information.

5 MJ: All right, before you proceed, I would like to get to the
6 court reporter, just to make sure, 320 is what exhibit?

7 TC[MAJ FEIN]: Your Honor, 320 is the original *ex parte* motion
8 for the Department of Homeland Security.

9 MJ: Okay, is that included in here?

10 **[The court reporter conferred with the military judge.]**

11 MJ: Oh, it's a classified exhibit, ----

12 TC[MAJ FEIN]: It's classified, Your Honor.

13 MJ: ---- okay; got it.

14 All right, proceed.

15 TC[MAJ FEIN]: Your Honor, I left off on 14 September, at
16 Appellate Exhibit 322, motion for CIA information -- you have that,
17 Your Honor? -- that's also a classified ----

18 MJ: All right.

19 TC[MAJ FEIN]: ---- motion. And then also the -- on 14
20 September, the government filed a supplement to the original M.R.E.
21 505(g) (2) motion for the FBI file, and that's been marked as
22 Appellate Exhibit 324.

1 MJ: All right, now, Appellate Exhibit 323 is a redacted
2 version of the classified exhibit, is that correct, with respect to
3 the CIA information?

4 TC[MAJ FEIN]: **[Pause]** One moment, please, Your Honor **[conferred**
5 **with assistant trial counsel]**.

6 MJ: Bailiff, if you would ----

7 TC[MAJ FEIN]: Your Honor, the Appellate Exhibit 319, which I've
8 already discussed, for Department of State, it actually encompassed
9 the unredacted and unclassified versions of both the CIA and the
10 Department of State filings.

11 MJ: All right.

12 TC[MAJ FEIN]: It was done in one exhibit, Appellate Exhibit
13 319.

14 MJ: Bailiff, if you would, please hand Appellate Exhibit 324
15 to -- 323, excuse me, to Major Fein.

16 **[The bailiff did as directed and the trial counsel reviewed AE 323.]**

17 TC[MAJ FEIN]: Your Honor, what we have is a mismarking. This
18 is actually -- the document you handed me that has been marked as
19 Appellate Exhibit 323 was actually an enclosure that was listed with
20 what has been marked as Appellate Exhibit 319. 319 -- Appellate
21 Exhibit 319 is the government's disclosure to the defense of the
22 unclassified and unredacted versions of the two -- of the Department

1 of State and the CIA motions; that was the enclosure provided, the
2 actual redacted, unclassified version.

3 MJ: So what would you choose to do with Appellate Exhibit 323
4 then?

5 TC[MAJ FEIN]: Your Honor, since we've already numbered 50 more
6 appellate exhibits after this, is we leave that marked as is and note
7 for the record that that is Enclosure -- the only enclosure to
8 Appellate Exhibit 319.

9 MJ: All right, any objection?

10 CDC[MR. COOMBS]: No objection, Your Honor.

11 TC[MAJ FEIN]: And as the court noted, the defense filed their
12 response at Appellate Exhibit 303 to each of the government's
13 requests for the Department of Homeland Security, CIA, Department of
14 State, and FBI.

15 MJ: All right, I have Appellate Exhibit 303.

16 TC[MAJ FEIN]: Your Honor, there was one other filing, although
17 it wasn't -- it was just a notice filing on the same day dealing with
18 discovery and that was on the 14th of September, 2012, what has been
19 marked as Appellate Exhibit 318. It was a government notice to the
20 court about the Office of the Director of National Intelligence
21 files. In accordance with the court's order, dated 1 August 2012,
22 the prosecution disclosed or made available for inspection all
23 discoverable files owned by ODNI.

1 MJ: All right.

2 The court considered all of the appellate exhibits that
3 were just announced and ruled on the 28th of September, 2012, as
4 follows:

5 The government has moved *ex parte* under Military Rule of
6 Evidence, M.R.E., 505(g)(2) and Rule for Court-Martial 701(g)(2) for
7 the court to conduct an *in camera* review of and authorize limited
8 disclosure in the form of redactions for Department of Homeland
9 Security and Department of State records and to substitute summary
10 for CIA records that the court ordered the government to produce to
11 the defense. The defense opposes redaction or substitution.

12 The court reviewed the government's unclassified and
13 classified motions for redactions to DHS and DoS records and to
14 substitution summary for CIA records. The court also conducted an *ex*
15 *parte* review of the original documents and the -- an *in camera* review
16 of the original documents and the proposed redactions and substitute.
17 In coming to this ruling, the court has considered the factors
18 requested by the defense in paragraph 7 of its 19 September 2012
19 response. The court finds and rules as follows:

20 DHS Records: The government notified the court that on
21 14 September 2012 all of the DHS records at issue were made available
22 to the defense except a single page with part of a line proposed for
23 redaction. The information redacted is not relevant to the accused

1 or to the charged offenses. The DHS records and redacted page meet
2 the government's discovery obligations under Brady and R.C.M.
3 701(a) (6) to disclose evidence tending to reasonably negate the guilt
4 of the accused to an offense charged, reduce the degree of guilt to
5 an offense charged, or reduce the punishment. The classified
6 information in the redaction is not necessary to enable the accused
7 to prepare for trial.

8 The government motion for redaction in accordance with
9 R.C.M. 701(g) (2) is granted.

10 CIA Records: The proposed substitute is an accurate
11 summary of the information in the original records and provides the
12 defense with the relevant facts necessary to prepare for trial. The
13 classified information in the original records is not favorable to
14 the accused, material to guilt or punishment, or necessary to enable
15 the accused to prepare for trial in accordance with M.R.E. 505(g) (2)
16 or R.C.M. 703(f).

17 The government motion to provide a substitute summary in
18 accordance with M.R.E. 505(g) (2) is granted.

19 Department of State Records:

20 A. The proposed redactions of the Department of State
21 documents in Bucket 3 are of information that does not involve the
22 accused or the charged offenses. The proposed substitute is an
23 accurate summary of the information in the original records and

1 provides the defense with the relevant facts necessary to prepare for
2 trial. The classified information in the original records is not
3 favorable to the accused, material to guilt or punishment, material
4 to the preparation of the defense, or necessary to enable the accused
5 to prepare for trial in accordance with M.R.E. 505(g)(2) or R.C.M.
6 703(f).

7 The government motion for redaction of irrelevant
8 information is granted.

9 B. The vast majority of the proposed redactions for the
10 Department of State documents in, quote, Bucket 2, unquote, are
11 personally identifiable information, PII, of individuals in the
12 persons at risk group and are properly redacted in accordance with
13 the court's 19 July 2012 ruling on the Defense Motion to Compel
14 Department of State Discovery - Motion to Compel #2. There is one
15 potential categorical exception. The court will meet *ex parte* with
16 the government counsel in an area appropriate for review of
17 classified information on or before 10 October 2012. The Bucket 2
18 documents will be produced for the meeting. A court reporter will
19 transcribe the classified proceedings.

20 The government motion for proposed redactions in Bucket 2
21 is granted in part. After the *ex parte* meeting, the court will
22 determine whether this ruling will be modified regarding certain
23 related documents.

1 No redacted information in the DHS, CIA, or DoS records
2 that has not been disclosed to the defense will be used by the
3 government or any government witnesses during any portion of the
4 trial, to include rebuttal and rule of completeness. The
5 substitution of the DHS record, CIA records, Bucket -- DoS Bucket 3
6 records and the vast majority of DoS Bucket 2 records is sufficient
7 for the defense to adequately prepare for trial and represents an
8 appropriate balance between the right of the defense to discovery of
9 relevant and necessary classified information and the protection of
10 national security information, particularly intelligence sources and
11 methods and safety of individuals identified by DoS as persons at
12 risk.

13 Ruling: The motions by the government to voluntarily
14 provide limited disclosure under M.R.E. 505(g)(2) for DHS, CIA, and
15 DoS Bucket 3 records is granted. The motion to -- government motion
16 to voluntarily provide limited disclosure under M.R.E. 505(g)(2) for
17 DoS Bucket 2 records is granted in part.

18 And that ruling has been marked as Appellate Exhibit 3

19 ----

20 TC[MAJ FEIN]: Your Honor, 302.

21 MJ: 302.

22 On the 2nd of October, the court did conduct an *ex parte*,
23 *in camera* M.R.E. 505(g)(2) hearing with the government that was

1 transcribed by a court reporter at the Department of State and we --
2 that hearing addressed the issues of concern by the court with
3 respect to the Bucket 2 documents and the court gave the government
4 additional guidance on a certain category of information that the
5 court required the government to either produce to the defense or go
6 back to the agency and come back with further M.R.E. 505 whatever the
7 government decided that it chose to do under that rule and --
8 Government?

9 TC[MAJ FEIN]: Yes, Your Honor. Your Honor, on 5 October 2012,
10 what has been marked as Appellate Exhibit, although classified, as
11 Appellate Exhibit 335, the government submitted *ex parte* via SIPRNet
12 a notice to the court for two different government entities. The one
13 specifically talked about here, the Department of State, that every
14 -- all the material identified by the court did receive approval to
15 be disclosed to the defense and that the redactions as applied -- or
16 were changed as directed by the court and that material is available
17 or will be made available to be produced or made available for
18 inspection to the defense upon ruling by the court.

19 MJ: All right.

20 Unless either side objects, the government has complied
21 with what the court required it to do in the 2 October 2012 *ex parte*,
22 *in camera* proceeding. The court will then grant the government's
23 motion with respect to the Bucket 2, Department of State records and

1 the government can then release or disclose those to the defense.
2 The court will follow up with a written order in that regard; any
3 objection?

4 CDC[MR. COOMBS]: No objection, Your Honor.

5 TC[MAJ FEIN]: No, Your Honor.

6 MJ: With respect to the government's motion under M.R.E.
7 505(g) and R.C.M. 701(g) with respect to the FBI, the court also
8 ordered an *in camera*, *ex parte* hearing to be conducted with the
9 government and transcribed by a court reporter with the FBI documents
10 at issue and the proposed substitution. That hearing was held on the
11 17th of October, 2012?

12 TC[MAJ FEIN]: 12th of October.

13 MJ: 12th of October, excuse me, on Friday, the 12th of
14 October, 2012, and the court's concerns with respect to the FBI
15 proposed redactions were relayed to the government and what is the
16 status of that?

17 TC[MAJ FEIN]: Your Honor, there were two due outs from that the
18 government had based off the court's direction. The first was solved
19 this morning. The court ordered that a certain portion of one of the
20 documents be disclosed to the defense as soon as possible. The
21 government sought approval and as of this morning what has been
22 marked as Appellate Exhibit 349, the government provided notice to
23 the defense of that paragraph. It is not in the original document

1 because of technical issues with the computer system, but we did give
2 a verbatim accounting of the portion that the government -- or,
3 excuse me, the court ordered to be disclosed. After this session,
4 once the computer network is up and running, we will actually
5 reproduce the document to the defense. We've also agreed to provide
6 the Bates number of the previously produced redacted version so the
7 defense has proper context to place this paragraph on the page.

8 MJ: All right, the court has ordered the government to meet
9 again with me in a R. -- M.R.E. -- or, I'm sorry, M.R.E. 505(g)(2)
10 session this afternoon to discuss the status of the additional
11 guidance that the court gave to the government, and we'll be doing
12 that after we recess today; that will also be transcribed by a court
13 reporter.

14 TC[MAJ FEIN]: Yes, Your Honor, and there's one other from the
15 session on 12 October. The court directed the government -- or two
16 tasks. We just spoke about one. The other was whether to disclose
17 certain infor -- other certain information or the government would
18 need to file a supplemental M.R.E. 505(g)(2) filing for the very
19 specific set of documents, and the government does intend to file a
20 505(g)(2) and is working on it and should have it this week.

21 MJ: All right, so then -- so your additional 505(g)(2) is
22 with respect to the second tasker?

23 TC[MAJ FEIN]: Yes, Your Honor.

1 MJ: All right, Captain Morrow?

2 ATC[CPT MORROW]: Yes, ma'am. The -- we looked at the
3 redactions; we've discussed the issue with the FBI. Those redactions
4 or the removal of some redactions has been approved and now it just
5 awaits your approval under 505(g)(2). We have the document prepared.
6 Again, it's a system issue in terms of the actual production of the
7 document for your ----

8 MJ: So just to make sure I'm understanding here, the Court
9 gave the government guidance on additional things that should be
10 produced to the defense. The government went back to the FBI and the
11 government intends to follow the court's guidance or the government
12 intends to come back with additional 505(g) redactions or
13 substitutions?

14 ATC[CPT MORROW]: The court intends -- well the government's
15 understanding with respect to -- the first issue, the court ordered
16 to disclose the information. The second issue, the court ordered the
17 government to address some of the court's concerns with respect to
18 the information in the document and to refile the document under
19 505(g)(2) so that the court could look at the information disclosed
20 and make a separate ruling on that particular document.

21 MJ: All right, so that's not ready for today's hearing.

22 ATC[CPT MORROW]: No, it's not ready for today's hearing; yes,
23 ma'am.

1 MJ: All right. Well, we'll have it anyway.

2 Anything else we need to address with those issues?

3 CDC[MR. COOMBS]: No, Your Honor.

4 TC[MAJ FEIN]: No, Your Honor.

5 MJ: All right, and the remaining, then, the portions of the
6 M.R.E. -- I haven't issued a written ruling with respect to the FBI
7 files yet. With respect to the remaining portions of the FBI files
8 that have not been disclosed to the defense, is there any impediment
9 at this point in disclosing those that aren't still at issue?

10 TC[MAJ FEIN]: No, Your Honor. We just understood, as Captain
11 Morrow said, is we just need to get you another copy of the document
12 with the changes and redactions and that's what -- once the system's
13 up we'll be able to do that for you.

14 MJ: All right, but you're not -- the rest of the documents
15 are not on hold waiting for that; is that right?

16 TC[MAJ FEIN]: That is correct, Your Honor.

17 MJ: Okay.

18 TC[MAJ FEIN]: It's on hold for your ruling, yes, Your Honor.

19 MJ: Well, again, orally, on the record, and I'll follow up
20 with a written ruling, the government motion for a 505(g)(2)
21 redaction and substitution is granted with the exceptions of what was
22 currently released to the defense in Appellate Exhibit 349 and the
23 outstanding M.R.E. 505(g) submission by the government that's coming

1 to me next week. And, again, I'll follow up with a written ruling in
2 that respect.

3 All right, also on the 12th of October, the government
4 moved the court for a ruling with respect to a CID regulation
5 chapter.

6 Would the government like to address that?

7 TC[MAJ FEIN]: Yes, Your Honor. This might be a good time also
8 to put on the record what has been marked about the speedy trial
9 motion and the response, because it was an enclosure to that, if it
10 may please the court?

11 MJ: All right.

12 TC[MAJ FEIN]: Starting with, Your Honor, on 19 September 2012,
13 the defense filed its speedy trial motion, what has been marked as
14 Appellate Exhibit 326.

15 MJ: **[Pause]** All right, I have Appellate Exhibit 326, which is
16 a 19 September 2012 Motion to Dismiss all Charges and Specifications
17 with Prejudice for Lack of a Speedy Trial.

18 TC[MAJ FEIN]: Your Honor, to answer this question, I am going
19 to -- well I know we'll get to it, but the different filings that
20 occurred about the chronology, I'm going to just jump to the response
21 the government filed to the defense's motion that is marked as
22 Appellate Exhibit 339; that was filed on the 10th of October, 2012.

23 **[Pause]**

1 TC[MAJ FEIN]: Your Honor, may I have a moment?

2 MJ: Yes.

3 **[There was a pause in the proceedings while AE 339 was brought into**
4 **the courtroom.]**

5 MJ: I can see Appellate Exhibit -- what is that -- 339 has
6 just arrived in a box. The court has a copy.

7 TC[MAJ FEIN]: Yes, ma'am. And so as -- what the government
8 filed is Enclosure 72 to the response to the defense's motion to
9 dismiss charges for speedy trial was -- so for Enclosure 72 was the
10 **[conferred with assistant trial counsel]** -- was a portion of the CID
11 regulation, Regulation -- CID Regulation 195-1, and what the
12 government filed was a request for a protective order as part of that
13 filing in order to use this regulation and provide it to the defense.

14 MJ: All right, and pursuant to that, the court had asked the
15 defense if there was any objection to that?

16 CDC[MR. COOMBS]: That is correct, Your Honor, and the defense
17 does not object to the government's request.

18 MJ: All right, as a result of that, on the 12th of October,
19 the court ruled on that motion; has that been added as an appellate
20 exhibit also?

21 TC[MAJ FEIN]: Yes, Your Honor. Your order is marked as
22 Appellate Exhibit 341 and your ruling is marked as Appellate Exhibit
23 340.

1 MJ: All right, and in substance the ruling was:

2 On the 10th of October, 2012, the government advised the
3 court that the Commanding General, U.S. Army Criminal Investigation
4 Command, USACIDC, invoked a privilege against disclosure of Chapter
5 8-2 of CID Regulation 195-1 to the defense. The government further
6 moved the court to grant a protective order that orders release of
7 CIDR 195-1, Chapter 8-2 to the defense and establishes protections
8 regarding the distribution and reproduction. The defense does not
9 object.

10 The government motion for protective order is granted,
11 and on the 12th of October, the court actually issued a protective
12 order for that chapter.

13 Is there anything else we need to address with respect to
14 the CID regulation?

15 CDC[MR. COOMBS]: No, Your Honor.

16 TC[MAJ FEIN]: No, Your Honor, other than as of yesterday, on 16
17 October 2012, that portion of the regulation was e-mailed to the
18 defense counsel, under the court's order, by CID Command.

19 MJ: All right, as part of the speedy trial, the speedy trial
20 litigation, the court ordered the parties to come up with a mutually
21 agreeable chronology of what both sides agree has occurred during the
22 trial and when it occurred, that's standard practice for speedy trial
23 motions, and there's a provision for it in the Rules of Court for

1 Army Practice for the parties to do that. The government had filed
2 -- or had given the defense by PDF file a chronology; would you like
3 to discuss that, Major Fein?

4 TC[MAJ FEIN]: Yes, Your Honor. On 26 September 2012, the
5 government filed its proposed speedy trial chronology in what has
6 been marked as Appellate Exhibit 330. The format of that filing was
7 a PDF document, and it was submitted on that date.

8 MJ: All right, I have Appellate Exhibit 330, which is the
9 Prosecution Disclosure to the Defense of the Speedy Trial Chronology,
10 26 September 2012. All right, and there was some e-mail traffic back
11 and forth between the government and the defense that the court was
12 cc'd upon that took some issue with that; would you like to discuss
13 that, Mr. Coombs?

14 CDC[MR. COOMBS]: Yes, Your Honor. The -- Appellate Exhibit 330
15 is a 231-page document that was presented in PDF form that at the
16 time was nonsearchable and also included a great deal of irrelevant
17 material that's not appropriate for a speedy trial chronology, so the
18 defense objected to that document being, in fact, in PDF form,
19 requesting that the government provide a Word version. Initially, we
20 just simply requested the government to do that by e-mail, the
21 government refused, and then we brought the issue up to the court.
22 Subsequent to that we had an 802 session discussing this issue, and
23 the court, at that time, advised the parties, in particular the

1 government, to use the defense's initial version of what the
2 chronology was, and that was part of our Appellate Exhibit 326,
3 Attachment A, and from that only include those matters which are, in
4 fact, relevant to a speedy trial chronology and at that point give it
5 to the defense and then we would work out a mutually agreeable
6 stipulation on the chronology.

7 The government last night, at roughly around -- just
8 shortly before midnight, gave another version of their chronology,
9 this time a 20-page chronology, and again this chronology contains a
10 lot of irrelevant material, but the defense now has it in Word
11 format, so what we'll do tonight and the rest of today is go through
12 that and pull that information out of that exhibit that is
13 appropriate for a speedy trial chronology and stipulate to that. In
14 addition to that, by midnight we'll file our reply to the
15 government's response to the speedy trial motion and that will be of
16 benefit to the court, not only with the chronology but also with our
17 argument tomorrow on the motion to compel witnesses.

18 MJ: All right, and I'm looking at the prosecution disclosure
19 to the defense speedy trial chronology, that's at Appellate Exhibit
20 350, and the government response to the defense request for the
21 government, in addition to the defense requesting the speedy trial
22 chronology be provided in a Word format document that they could
23 edit, the government -- or the defense also requested the *ex parte*

1 due diligence filing that the government had given the court back
2 when the court ordered the due diligence, and that was ----

3 CDC[MR. COOMBS]: I believe Appellate Exhibit 264.

4 MJ: Appellate Exhibit 264, thank you. And the government
5 response here is at Appellate Exhibit 333.

6 Government, would you like to address this issue before I
7 address the R.C.M. 802 conference that the court held with the
8 parties regarding these two issues? It was a telephonic R.C.M. 802
9 conference that was held on the 5th of October, 2012, at 1300.

10 Major Fein?

11 TC[MAJ FEIN]: Yes, Your Honor. On 2 October 2012, as the court
12 just noted what has been marked as Appellate Exhibit 333, the
13 government responded to the defense's request to disclose due
14 diligence in the speedy trial chronology issue. The government has
15 contested this entire time the relevance determination as made by the
16 court during the speedy trial litigation. So what the defense judges
17 and as is explained in the motion judged as to what is relevant or
18 not is very subjective and is inconsistent and that's why the whole
19 purpose of it, as the court explained, is to figure out what the
20 defense would stipulate to or not. What the government originally
21 did is provided all the facts that we consider relevant for speedy
22 trial for the court. The defense decided to go down the litigation
23 route instead of actually reviewing it. Their choice; we understand.

1 The court directed both parties to reevaluate the process and start
2 again and that's what's happened.

3 So on 2 October, in our filing, the government explained
4 exactly why, both system-wise and for the purposes of ultimate
5 efficiency, although that is not what ended up occurring, why the
6 government provided the document it did. In addition to the filing
7 on 2 October, what's -- what was included as Enclosure 2 was a
8 searchable version of the PDF for the defense to quickly go through
9 and whatever the defense needs to do that was disclosed. And then
10 after that, Your Honor, was the R.C.M. 802 conference.

11 MJ: All right.

12 CDC[MR. COOMBS]: And, of course, the judge, Your Honor, will
13 summarize the 802, but the context of the discussion on the
14 government's initial speedy trial chronology filing was, and the
15 court agreed that the defense should not have to go through 231 pages
16 of irrelevant material, that the parties ----

17 MJ: Well that's not exactly ----

18 CDC[MR. COOMBS]: ---- should work together.

19 MJ: ---- what the court said. The court's position was that
20 both sides should have input into the trial chronology; therefore, it
21 needed to be in a format where both sides could edit it.

22 CDC[MR. COOMBS]: Correct, and then so from the launching
23 starting point we started with the defense's filing of Appellate

1 Exhibit -- Attachment A to our speedy trial motion. The -- what we
2 got back, and, again, we'll go through this because we haven't had an
3 opportunity to go through it entirely, but it doesn't appear to be
4 that much different as far as continuing a lot of irrelevant
5 material. So, again, we'll go through it ----

6 MJ: Well you all can decide that among yourselves and we'll
7 see what the end product is.

8 CDC[MR. COOMBS]: Yes, Your Honor.

9 MJ: All right, once again, the purpose of a speedy trial
10 chronology is there are certain things that happened on certain dates
11 that are backed up by documents that are backed up by exhibits
12 information. I hope the parties are not contesting those kinds of
13 things. Things happened when they happened, that's just a fact, so
14 those are the kinds of things that should be in a speedy trial
15 chronology. And the reason for speedy trial chronologies is to
16 narrow what is at issue and have the parties stipulate to what is not
17 so we can focus the litigation.

18 With respect to the 5 October 2012 R.C.M. 802 conference
19 that was held telephonically, the court followed up that afternoon
20 with an e-mail to the parties that summarized the R.C.M. 802
21 conference and offered both sides an opportunity to add to that
22 synopsis; neither side chose to do so. And the e-mail reads as
23 follows:

Counsel, the court scheduled a telephonic R.C.M. 802 session with the parties to discuss a 27 September 2012 motion filed by the defense that was not in the trial schedule to make any necessary scheduling adjustments to maintain the current trial schedule. The telephonic R.C.M. 802 conference occurred on 5 October 2012, at 1300. Present were: Colonel Lind, that's me; Major Fein; Captain Overgaard; Captain Morrow; and Captain Whyte, for the government; and Mr. Coombs, for the defense. Both parties consented to participating in the telephonic R.C.M. 802 conference. The following new suspense dates were established:

1. The court granted the government request for continuance until 16 October to file the joint chronology.

2. The government will file a redacted version of Appellate Exhibit 264, *ex parte* due diligence filing, with the court by 12 October 2012.

3. The government will schedule an *ex parte, in camera* session with the court on 12 October regarding the government's 14 September 2012 M.R.E. 505(g) motion with respect to the FBI records. We've just discussed that earlier.

4. During the 29 October to 2 November 2012 Article 39(a) session, the government will present a plan to the court to maintain classified appellate exhibits that are not accompanying the record of trial in one location under the custody of one custodian

1 with a systematic, periodic review to ensure accountability of the
2 appellate exhibits through appellate review.

3 This e-mail synthesizes what occurred during the
4 telephonic R.C.M. 802 conference; either party may supplement the
5 court's synopsis of what occurred. The following issues were
6 discussed:

7 1. In its September 2012 motion, the defense moved the
8 court to order the government to produce its speedy trial chronology
9 in a Microsoft Word or spreadsheet format and to disclose Appellate
10 Exhibit 264, the government's *ex parte* due diligence filing, with the
11 court. The government responded to the motion on 2 October 2012,
12 advising the court that the government provided the chronology to the
13 defense in a searchable PDF format and objected to giving the defense
14 the chronology in a Word or spreadsheet format because the original
15 contains classified information and work product of the government.
16 The government also objected in disclosing the due diligence filing
17 to the defense because the information the defense seeks is in the
18 government chronology. Most of the information in the due diligence
19 filing will be in the government response to the speedy trial motion.
20 Some of the information in the due diligence filing is classified and
21 the government does not have authority to disclose it; and some of
22 the information disclosed to the court in the due diligence filing is
23 the government's work product.

1 A. Speedy Trial Chronology. The court advised the
2 parties that the speedy trial chronology should be in a format where
3 both sides have input and should contain all of the relevant dates
4 the parties agree to. The parties will use Enclosure 1 to the
5 defense speedy trial motion in Word format as a beginning. The
6 government requested a continuance to file the joint speedy trial
7 chronology until 17 October 2012; the defense did not object. The
8 court granted the government request for a continuance to 16 October
9 2012.

10 B. Due Diligence Filing to the Defense. The court
11 ordered the government to produce a version of the due diligence
12 filing disclosure with the classified information and work product
13 the government believes should be redacted by Friday, 12 October
14 2012, in hard copy to the court. The government's response to the
15 speedy trial motion is due Wednesday, 10 October 2012. The court
16 will have the government's response to the speedy trial motion and
17 the redacted due diligence filing and will rule on whether to require
18 disclosure.

19 2. Maintaining Classified Appellate Exhibits. The
20 government moved the court to allow two agencies maintaining
21 sensitive classified information that are AEs to maintain that
22 information at the agency; the defense did not object.

1 The court advised the government that maintaining
2 accountability of the complete record of trial, to include all of the
3 exhibits through appellate review should that occur, is an overriding
4 interest of the government, the defense, and the court. The
5 government will present the court with a plan to have such agency
6 information located at one location under the custody and control of
7 one custodian with a procedure for systematic review that takes into
8 account the PCS movement of personnel involved in the trial to ensure
9 the records are accounted for. The government will have this
10 information, government plan for one location, one custodian
11 systematic review, to ensure the records remain available through any
12 appellate review. The government will advise the court of its plan
13 with respect to such records during the 29 October through 2 November
14 2012 Article 39(a) session. We'll have to build that into the trial
15 calendar, as well.

16 3. Speedy Trial Witnesses. The government asked whether
17 the 17 and 18 October 2012 Article 39(a) session should be extended
18 because the defense maintains its request for 86 witnesses. The
19 defense maintained its request for witnesses from 63 agencies are
20 necessary because the government representations to the court
21 regarding ONCIX are inconsistent with ONCIX entries in the government
22 chronology on 13 January and 18 February 2011. The government
23 disagreed with that characterization. The court advised the parties

1 the issues would be litigated at the Article 39(a) session, and that
2 the Article 39(a) session need not be extended because the arguments
3 for or against production of most of the requested defense witnesses
4 would be the same for the same category of the witnesses requested,
5 e.g., the 63 agency witnesses. Neither party disagreed. Defense
6 maintained the individual OCA witnesses would be necessary because
7 the OCA reviews were a justification on most of the approved Article
8 32 delays.

9 4. The Government Proposed M.R.E. 505(g) Limited
10 Disclosure FBI File. On 14 September 2012, the government moved the
11 court to allow limited disclosure of the redacted FBI file pertaining
12 to the accused. The government advised the accused the court
13 reviewed the M.R.E. 505(g) limited disclosure and requires an *ex*
14 *parte, in camera* proceeding with the government to be recorded by a
15 court reporter to address the proposed limited disclosure. The
16 government advised the court it would schedule the session on
17 12 October 2012, which it did.

18 Is there anything further with respect to the telephonic
19 R.C.M. 802 conference?

20 CDC[MR. COOMBS]: Nothing with respect to the court's summary,
21 but one of the issues, the Appellate Exhibit 264, the government has
22 since produced on its own accord as part of its Appellate Exhibit
23 339; that was Enclosure 57. The Enclosure 57 is classified, however.

1 Much of the document, though, is unclassified. The defense has made
2 a verbal request of the government to provide a unclassified version
3 of Enclosure 57 for our use, and the government has indicated that
4 they'll look at that request. Assuming the parties can agree, it
5 shouldn't be an issue; if it's not, then the defense will request the
6 court to order an unclassified version of Enclosure 57 to be
7 produced.

8 MJ: All right, so the government's still contemplating that
9 issue?

10 TC[MAJ FEIN]: Yes, Your Honor; that was brought up this
11 morning, so we're starting to contemplate after today's motions
12 hearing.

13 MJ: All right.

14 So with respect to the defense motion to disclose the ex
15 parte due diligence filing and produce the speedy trial chronology in
16 Word, the court has not issued a written ruling with respect to those
17 motions. Other than the outstanding issue that you've just
18 discussed, the fact that the defense -- the government's provided the
19 defense with the ex parte filing already and the speedy trial
20 chronology already is there any necessity for the court to further
21 address this -- these motions?

22 CDC[MR. COOMBS]: No, Your Honor.

1 TC[MAJ FEIN]: No, Your Honor. And also just to note, Appellate
2 Exhibit 350, we've already discussed, the speedy trial chronology
3 that the government completed by the court's suspense of last night
4 was submitted to the court and defense in a Word format, so we did
5 that last night so they have it.

6 MJ: All right, and the speedy trial issue is scheduled for
7 litigation at the next Article 39(a) session, which is scheduled for
8 the 28th -- 29th of October through the 2nd of November, if I'm
9 correct; is that right?

10 TC[MAJ FEIN]: That is correct, Your Honor.

11 MJ: Also during the recess between the last Article 39(a)
12 session and this Article 39(a) session, the government has provided a
13 supplemental witness list and *DiGilio* disclosures. The defense has
14 also supplemented their Article 13 witness list, asking for Colonel
15 Thomas Johnson and Captain Brian Villiard; that was on the 16th of
16 October. And the government has responded -- I'm sorry. The defense
17 request was on the 26th of September, 2012, for those two witnesses,
18 and the government's response was on the 16th of October, 2012.

19 Has the supplemental prosecution article -- prosecution
20 witness list been ----

21 CDC[MR. COOMBS]: The defense is at Appellate Exhibit 329, Your
22 Honor.

1 MJ: All right, and the government response to the additional
2 Article 13 witnesses is?

3 TC[MAJ FEIN]: Ma'am, that is -- that was filed yesterday, and
4 it is marked as Appellate Exhibit 351.

5 MJ: All right, I have Appellate Exhibit 351. The government
6 also has a supplemental Article 13 witness, if I'm correct.

7 TC[MAJ FEIN]: Yes, ma'am. Actually, ma'am, on 4 September
8 2012, the government filed a supplemental government witness list for
9 Article 13; what's been marked as Appellate Exhibit 304.

10 **[The military judge conferred with the court reporter. There was a**
11 **pause in the proceedings while the court reporter located AE 304.]**

12 MJ: Why don't we do this: Why don't we have the bailiff hand
13 -- oh, never mind. We have Exhibit 304, Supplement to the
14 Prosecution Article 13 Witness List for a Major Timothy Zelek. And
15 so those are the supplemental Article 13 witnesses.

16 Now the government also filed a general supplemental
17 trial witness list; has that been marked as an appellate exhibit?

18 TC[MAJ FEIN]: It has, Your Honor. On 15 October 2012, the
19 government filed a supplemental witness list with explanations; it's
20 been marked as Appellate Exhibit 343. This -- I'll hold one moment,
21 Your Honor.

22 **[There was a pause in the proceedings while the court reporter**
23 **located AE 343 and handed it to the military judge.]**

1 MJ: All right, I have a copy of Appellate Exhibit 343.

2 TC[MAJ FEIN]: Yes, Your Honor, and to clarify it's not
3 necessarily a supplemental; it's just a republishing of the witness
4 list because witnesses change, so it's really an update; and also
5 provided on there are explanations of what the government in general
6 intends to elicit from each of the witnesses. The reason the
7 government added that, although not normal practice, is in order to
8 provide the defense adequate notice when they talk to them, because
9 of the number of witnesses, of what -- why the government intends to
10 offer these witnesses; and second, the defense in order to properly
11 receive the authority or authorization to discuss classified
12 information with those witnesses, the government identified
13 specifically who absolutely will be testifying concerning classified
14 information and those that there's a potential depending on what
15 would happen with the cross-examination and that has been expressly
16 identified in that filing next to each witness's name.

17 MJ: All right, has the defense had an opportunity to look at
18 Appellate Exhibit 343?

19 CDC[MR. COOMBS]: Yes, Your Honor.

20 MJ: Any issues with it?

21 CDC[MR. COOMBS]: No issues, Your Honor.

22 MJ: And there was also a Giglio disclosure; is that correct?

1 TC[MAJ FEIN]: Yes, Your Honor. [Pause] Yes, Your Honor.

2 There are two other notices or disclosures to the defense on the 5th
3 of October. The first one was what has been marked as Appellate
4 Exhibit 346, which is the government's disclosure of Giglio material,
5 and it summarizes disclosure, Your Honor. Beginning in July 2012,
6 the United States began requesting any impeachment materials for
7 witnesses not being offered purely for authentication purposes. An
8 example of that request that the prosecution used is enclosed with
9 this motion -- or, excuse me, with this disclosure to the defense;
10 and as we receive that information, we continue to search our files,
11 the prosecution's files, and the records that we received from the
12 organizations that we requested and any information that would fall
13 under Giglio as impeachment material has been disclosed or made
14 available to the defense.

15 MJ: Now there's a lot of "will coordinate" in here. Is there
16 a necessity to set some suspense dates for this?

17 TC[MAJ FEIN]: Your Honor, we could set suspense dates but we
18 are currently coordinating. The reason it says "will coordinate" on
19 that witness list is because those individuals are solely for
20 authentication purposes, and as we described, because of just the
21 sheer volume of individuals, and the same organizations are also,
22 we're coordinating discovery issues; we focus solely on substantive
23 witnesses, not those offered solely for authentication. Now we're

1 going back and doing all of the authentication. We don't expect it
2 to take that much time, Your Honor, and we can give the court
3 periodic updates and the defense.

4 MJ: The other question I had is by a lot of these -- by some
5 of these witnesses it says, "Any material relating to this witness is
6 available for inspection by the -- with the prosecution." Does that
7 mean there is Giglio material, that there is not, or just that there
8 is material available for inspection? I'm confused.

9 TC[MAJ FEIN]: It would be material that would likely fall under
10 Giglio, Your Honor. There's -- in some cases we received files that
11 had extraneous matter; others we received just the very specific
12 criteria that we asked for, so it varies so we used the general
13 language, but if there's Giglio material, it would be there. It's
14 only for a handful of individuals, Your Honor, and the government has
15 a binder for the defense to be able to inspect and take whatever
16 notes they want to take back with them of all this very personal
17 information. And that's also including what has already been
18 produced over the last year-plus to the defense, such as adverse
19 actions of service members and other impeachment material of
20 civilians.

21 MJ: All right.

22 Any issues?

1 CDC[MR. COOMBS]: No; the one issue was what the court
2 highlighted. The defense was going to ask whether or not that meant
3 each of those witnesses had some sort of material or the government
4 was still trying to identify whether or not each witness had
5 material. So if I understand the government correctly, they've
6 reduced it to a file for the witnesses where there is, in fact,
7 responsive material and they'll provide that to the defense to look
8 at apparently at their office or will they provide a copy of that to
9 the defense?

10 TC[MAJ FEIN]: Your Honor, the -- for example, so we can stop -
11 - well instead of talking around it, for the Number 2 individual on
12 the list, the government wrote, "In addition to disclosures already
13 provided," so that would be previously disclosed material, "any
14 material relating to this individual or witness is available for
15 inspection," so that response there is a binder; there's information
16 for the defense to come to the office and inspect. We have it up
17 here with us now. Everywhere we -- every time we come up to Fort
18 Meade, we have all of the material ready for inspection or anytime as
19 long as we had some notice down in our office at Fort McNair, so it
20 is available in a binder for them to inspect.

21 MJ: All right, why don't you take a look at it, and then see
22 if you need to readdress this in any fashion.

23 CDC[MR. COOMBS]: Yes, Your Honor.

1 TC[MAJ FEIN]: Your Honor, also on the 14th of October, 2012,
2 the government provided disclosure of R.C.M. 914 material, Jencks
3 material. It's been marked as Appellate Exhibit 345.

4 Your Honor, may I have a moment?

5 MJ: Yes.

6 **[The trial counsel and assistant trial counsel conferred.]**

7 TC[MAJ FEIN]: Your Honor, one other point, because this would
8 be true for the Jencks material. For Appellate Exhibit 346, the
9 Giglio material, that was for the original government witness list,
10 so now the government for any additional witnesses that have been
11 added is doing the exact same procedure following this motions
12 session to start searching those personnel records for any additional
13 witnesses.

14 Your Honor, for Appellate Exhibit 345, the government on
15 15 October disclosed to the defense that pursuant to the procedures
16 the prosecution intended to follow and the defense did not object to,
17 that's already been marked as Appellate Exhibit 270, that we have
18 provided or made available for inspection that material to the
19 defense, if there is any Jencks or R.C.M. 914 documents.

20 MJ: All right.

21 TC[MAJ FEIN]: And, of course, the government understands it's a
22 continuing obligation up until they testify if there's any new
23 statements.

1 MJ: Any issues from the defense with respect to Jencks?

2 CDC[MR. COOMBS]: Again, we'll look at what the government has
3 set aside, and if there is any issues from that, we'll address that
4 with the court.

5 MJ: Now the defense has also filed a witness list on the
6 merits, for the merits and sentencing?

7 CDC[MR. COOMBS]: That is correct, Your Honor; that's Appellate
8 Exhibit 344.

9 MJ: All right, Government, any issues with Appellate Exhibit
10 344 at this time?

11 TC[MAJ FEIN]: No, Your Honor. We're still going through the 43
12 witnesses.

13 MJ: All right, and the defense has also filed in accordance
14 with the court's calendar a notice of plea, forum, and expected
15 motions?

16 CDC[MR. COOMBS]: Yes, Your Honor; that's Appellate Exhibit 342.

17 TC[MAJ FEIN]: Your Honor, before we go through that, may we
18 continue the accounting of the others or would you rather ----

19 MJ: Yes.

20 TC[MAJ FEIN]: ---- jump right into that?

21 MJ: That's fine.

1 TC[MAJ FEIN]: Okay, Your Honor.

2 Previously, we discussed the government filed its witness
3 list on 15 October 2012, and we've already discussed it was Appellate
4 Exhibit 343. In addition to that, the government filed what has been
5 marked as a classified exhibit, Appellate Exhibit 348, and that is a
6 classified supplemental witness list that was e-mailed to the court
7 and to the defense security experts on the same day of 15 October.

8 [Pause] And then, Your Honor, on 6 September 2012, which has been
9 marked as Appellate Exhibit 305, the defense filed via e-mail
10 photocopies of the Finkel book that end up -- will be an enclosure to
11 Appellate -- what has been previously marked as Appellate Exhibit
12 235. And, Your Honor, the remaining -- I'm sorry. There's two more.

13 On 15 October 2012, the government filed an *ex parte* notice to the
14 court via SIPRNet; that's been marked as Appellate Exhibit 347; and
15 then on 16 October 2012, the government provided notice to the court
16 on the Department of State files. This is in response to the court's
17 order to -- that approved the redactions or substitutions for the
18 Department of State and the notice essentially, again Appellate
19 Exhibit 352, is that information is available for inspection with the
20 prosecution or available for inspection at the Department of State;
21 and for the material that's available with the prosecution, we do
22 intend to produce all of that material to the defense in our normal
23 production discovery process, but because we just received it, we

1 don't -- we don't have the systems in place to do that. We'll do it
2 by the end of next week so they have their own copy.

3 MJ: All right.

4 TC[MAJ FEIN]: The only remaining filings or any other
5 pleadings, Your Honor, that have occurred deal with the two motions
6 that we are going to be litigating this session, other than the plea
7 and forum.

8 MJ: Okay.

9 Let's then move on to Appellate Exhibit 342, which is a
10 Defense Notice of Plea, Forum, and Expected Motions. And the court
11 held a brief R.C.M. 802 with the parties earlier today. We're going
12 to go over this in detail with PFC Manning on the -- during the
13 Article 39(a) session on the 10th through the 14th of December, so
14 just for now, PFC Manning, have you seen what I have here marked as
15 Appellate Exhibit 342?

16 ACC: Yes, Your Honor.

17 MJ: Okay, and have you looked at the notices of plea?

18 ACC: I have, Your Honor; yes.

19 MJ: Okay, have you discussed this with your counsel?

20 ACC: Yes; yes, Your Honor.

21 MJ: And do you authorize this submission to the court?

22 ACC: I do, Your Honor; yes.

23 MJ: Have you looked at the anticipation of forum?

1 ACC: I have, Your Honor; yes.

2 MJ: Okay, and do you authorize your counsel's submission of
3 this document to the court at this time?

4 ACC: Yes, Your Honor.

5 MJ: Okay, and the anticipated motions, do you authorize your
6 counsel to submit that to the court at this time?

7 ACC: Oh, yes, Your Honor.

8 MJ: Okay. And, once again, I'm not going to go through this
9 in detail at this time; it's premature. We'll go through it the week
10 of the 10th through the 14th of December in its entirety.

11 ACC: Yes, Your Honor.

12 MJ: Does either side desire for me to do any further inquiry
13 at this point?

14 CDC[MR. COOMBS]: No, Your Honor.

15 TC[MAJ FEIN]: No, Your Honor.

16 MJ: The other issues that we have for litigation this session
17 are the two motions for judicial notice from the defense. The one on
18 the Finkel book, which I have here, is Appellate Exhibit 305; that
19 motion was accompanied by an e-mail that basically said that the
20 defense requests the court to take judicial notice of the book, the
21 date it was published, and the provided excerpt; and then compare the
22 book with the charged video for Specification 2 of Charge II and take

1 judicial notice that the book quotes the video verbatim at certain
2 key points; is that correct?

3 CDC[MR. COOMBS]: That is correct, Your Honor.

4 MJ: Okay. And this was litigated at the last Article 39(a)
5 session?

6 CDC[MR. COOMBS]: Our original motion was Appellate Exhibit 235,
7 Your Honor.

8 TC[MAJ FEIN]: The government response was 236. The government
9 will only add, Your Honor, that it was our understanding that you had
10 ruled that you wouldn't take judicial notice that it was a verbatim
11 transcript because of your ruling essentially that verbatim had word
12 for word but that you would look at the video and make a decision
13 based on it.

14 MJ: May I see the government's response and my ruling,
15 please? They are at Appellate Exhibits ----

16 **[The court reporter conferred with the military judge.]**

17 MJ: All right, the court reporter has to go and get those
18 exhibits, and I'm thinking at this time this is probably a very good
19 time for a recess. Before we do recess, though, we have the two
20 motions for judicial notice and we have the motion to compel the
21 speedy trial witnesses for the defense. The defense is producing a
22 reply to the government's speedy trial motion that during the R.C.M.
23 802 session the defense proffered would be helpful to the court in

1 making its decisions, so the parties and the court, we've decided
2 we're going to litigate the judicial notice motions today, and then
3 recess the court and we are going to convene tomorrow at 1300, as
4 opposed to the normal time of 10 o'clock, to litigate the motion to
5 compel the speedy trial witnesses.

6 Is that the understanding of the parties?

7 CDC[MR. COOMBS]: Yes, Your Honor.

8 TC[MAJ FEIN]: Yes, Your Honor.

9 MJ: Okay, is there anything else that the court has neglected
10 to mention that we are addressing during this Article 39(a) session,
11 except, of course, you know, to meet to update the court calendar and
12 that kind of thing?

13 CDC[MR. COOMBS]: No, Your Honor.

14 TC[MAJ FEIN]: No, Your Honor.

15 MJ: All right, how long of a recess would you like at this
16 time?

17 CDC[MR. COOMBS]: Fifteen minutes would be fine, Your Honor.

18 TC[MAJ FEIN]: Fifteen is fine, Your Honor. However, Your
19 Honor, before we go on recess, the government also has the -- the
20 court e-mailed last night both parties asking the government to print
21 for the court all of the e-mails that are referenced in the speedy
22 trial response and that were listed in Enclosure 1 and we have those

1 now printed in the order the court has asked and after this -- during
2 this recess we can give it to the court.

3 MJ: All right, now you're going to just attach that, then, as
4 part of the -- well they're already in the e-mails; do we need to
5 make that a separate appellate exhibit at this time ----

6 TC[MAJ FEIN]: Well, Your Honor, ----

7 MJ: ---- or just ----

8 TC[MAJ FEIN]: ---- these are already all in Enclosure 1 to the
9 ----

10 MJ: So ----

11 TC[MAJ FEIN]: ---- response.

12 MJ: ---- so there's no necessity for an additional appellate
13 exhibit; is that correct?

14 TC[MAJ FEIN]: No, Your Honor.

15 MJ: It's just a helpful aid for the court.

16 TC[MAJ FEIN]: Yes, ma'am.

17 MJ: Okay.

18 Defense, do you agree?

19 CDC[MR. COOMBS]: Yes, Your Honor.

20 MJ: Anything else we need to address?

21 TC[MAJ FEIN]: No, Your Honor.

22 CDC[MR. COOMBS]: No, Your Honor.

23 MJ: Court is in recess.

1 [The Article 39(a) session recessed at 1138, 17 October 2012.]

2 [The Article 39(a) session was called to order at 1158, 17 October
3 2012.]

4 MJ: This Article 39(a) session is called to order. Let the
5 record reflect all parties present when the court last recessed are
6 again present in court.

7 The court reporter is handing me Appellate Exhibit 235,
8 which was the 3 August 2012 original defense motion for judicial
9 notice of excerpts from Mr. Finkel's book; and Appellate Exhibit 236,
10 which is the government response to that notice; and I have the
11 defense supplement, which is at Appellate Exhibit 316. There is also
12 -- the court ruled on this issue with respect to the first motion by
13 the defense; that should be an appellate exhibit also or did I not
14 issue a written ruling on that? I thought I did.

15 CDC[MR. COOMBS]: I don't have that in my notes, Your Honor.

16 TC[MAJ FEIN]: I don't believe you issued a written ruling,
17 ma'am.

18 MJ: Oh, I didn't issue a written ruling, okay. Well my
19 understanding, if I remember it correctly, was you supplied me with a
20 copy of the pages of the book that I would take judicial notice of
21 the book and the excerpt.

1 CDC[MR. COOMBS]: That is correct, Your Honor, and that --
2 actually you had stated it was Appellate Exhibit 316; it's Appellate
3 Exhibit 305.

4 MJ: The defense supplement?

5 CDC[MR. COOMBS]: Correct, ma'am; the excerpt from the book.

6 MJ: Oh, the excerpt from the book. No; I was looking at the
7 actual supplement -- oh, this is the public statements; okay, excuse
8 me.

9 CDC[MR. COOMBS]: Yes, Your Honor.

10 MJ: I didn't realize I had both motions here.

11 TC[MAJ FEIN]: I don't believe the defense supplement addressed
12 the Finkel issue at all, so it only addresses the statements issue.

13 CDC[MR. COOMBS]: That is correct.

14 MJ: Yes. The -- what I do have, though, is the e-mail that
15 accompanied the excerpt stated, "I have attached the requested
16 excerpt from David Finkel's book, *The Good Soldiers*. The defense
17 requests the court take judicial notice of the book, the date it was
18 published, and the provided excerpt; and once the court compares the
19 excerpt with the charged video, the defense also requests the court
20 to take judicial notice that the book quotes the video verbatim in
21 several key points." The court has compared the video with the
22 excerpt of the book.

23 Defense, would you like to add anything in oral argument?

1 CDC[MR. COOMBS]: Just very briefly, Your Honor.

2 We supplied the court with everything the court would
3 need under M.R.E. 201 in order to take judicial notice. The fact
4 that Mr. Finkel must have had a copy of what is the video within
5 Specification 2 of Charge II should be without any dispute, given the
6 fact that from page 105 forward within his book he quotes verbatim
7 the video. There is simply no other way that he could do that if he
8 didn't have a copy of the video.

9 MJ: Well doesn't the book also reference audio transcripts
10 from the flight?

11 CDC[MR. COOMBS]: The audio transcripts from the flight would
12 in fact, be the in-flight recorder which records everything, the
13 audio and video, which is the item charged in Specification 2 of
14 Charge II.

15 MJ: **[Pause]** All right, Mr. Coombs, this -- I just want to
16 look here. I just want to make sure I'm understanding this. The
17 book on page 106 says, "Everything the crew members in both Apaches
18 was saying was being recorded."

19 CDC[MR. COOMBS]: Yes, Your Honor.

20 MJ: So there's an audio recording and there was a visual
21 recording of what they were seeing as well.

22 CDC[MR. COOMBS]: It's one in the same, Your Honor. The -- you
23 know, if need be, unless the government would stipulate, the Apache

1 helicopter has a recording device that records everything that
2 happens with the Apache helicopter, and that could be readily
3 determined for judicial notice as well. It records not only what the
4 Apache crew is seeing as they move, so the recording is based upon
5 the crew's sights, but it also records the audio and then, of course,
6 there's telemetry and other recordings that are done by other aspects
7 of the Apache helicopter in order for at a later date, if need be,
8 somebody to see exactly what the crew did, how -- the altitude,
9 everything you could find out. In this aspect here, it's clear that
10 Mr. Finkel must have had what is Specification 2 of Charge II, a copy
11 of that, because that's the only version that would exist where you
12 would have the ability to see what the crew saw and said.

13 MJ: So there's no -- this -- I just want to make sure the
14 defense -- I understand the defense's position or proffer to me, so
15 there's not two files. There's not an audio file that you could
16 somehow capture and then the video file, which also has the audio?

17 CDC[MR. COOMBS]: That is correct, Your Honor. So it's one
18 file, and even in -- within his book, he describes what the crew is
19 seeing, so not only does he quote verbatim the video, which is easy
20 to determine by just comparing the video as you press play with what
21 he accounts in his book, but he also describes what the crew is
22 seeing, so he is viewing the video that's Specification 2 of Charge
23 II. It's a fact that we would request that you take judicial notice

1 of because it is a fact that is relevant to the current charged
2 offense.

3 MJ: [Pause] All right, thank you.

4 CDC[MR. COOMBS]: Thank you, Your Honor.

5 MJ: Government? First of all, Government, before we go
6 farther, do you have any objection to my taking judicial notice of
7 the book?

8 ATC[CPT MORROW]: No, Your Honor, and I believe we -- I think we
9 stated that last time.

10 MJ: The date it was published?

11 ATC[CPT MORROW]: The date it was published and the book so.

12 MJ: And the excerpt.

13 ATC[CPT MORROW]: No, Your Honor.

14 MJ: Okay, well do you have any objection to my comparing the
15 book to the video and taking judicial notice that the book quotes the
16 video verbatim at several key points?

17 ATC[CPT MORROW]: We do, Your Honor. We renew our objection in
18 that regard.

19 MJ: Why?

20 ATC[CPT MORROW]: Our review of the video and the excerpts in
21 the book is -- did not lead us to believe it was a verbatim
22 transcript. Again, "verbatim" means word for word. We can provide
23 sort of an accounting, a more detailed accounting at a later date,

1 but in our opinion it wasn't verbatim and there were key excerpts
2 missing, as well as some dialog.

3 The other point the government would like to make, Your
4 Honor, is that ----

5 MJ: Well key excerpts missing, but if you compare the video
6 with the book, there are a lot of things that are said the same.

7 ATC[CPT MORROW]: Yes, Your Honor. There were -- are some
8 things that are said the same, yes.

9 MJ: Does the government have a theory, then, on how this Mr.
10 Finkel got this information without looking at the video?

11 ATC[CPT MORROW]: Well that -- we don't have a theory on that,
12 Your Honor, but that, in fact, kind of goes to what -- the way the
13 defense characterized what they want you to take judicial notice of.
14 I mean, I don't think we can leap to the conclusion that he must have
15 had the video in front of him. There's -- we don't know. Again, all
16 we know is that there are excerpts in a book; in some places they
17 match the video, the charged video, and in some places they don't.

18 MJ: I asked the defense the question of whether there are
19 separate audio and visual recordings taken in an aircraft or taken in
20 this aircraft. Does the government have a position on that?

21 ATC[CPT MORROW]: No, Your Honor. I believe it's the same file,
22 so the same video/audio file.

23 MJ: So there's only one.

1 ATC[CPT MORROW]: Yes, ma'am.

2 MJ: So if you have access to the audio, you also have access
3 to the video.

4 ATC[CPT MORROW]: Yes, ma'am.

5 MJ: All right, thank you.

6 Anything further?

7 CDC[MR. COOMBS]: No, Your Honor.

8 MJ: All right, the court will take this under advisement and
9 have a ruling on this tomorrow.

10 TC[MAJ FEIN]: Your Honor, may we have a moment?

11 MJ: Yes.

12 **[The trial counsel and assistant trial counsel conferred.]**

13 ATC[CPT MORROW]: Again, Your Honor, the government would just
14 like to reiterate that the fact that Mr. Finkel must have had
15 something in front of him is not a fact that should be judicially
16 noticed by the court. The court should take judicial notice of
17 whether it's a verbatim transcript or not or whether it matches the
18 video in some places or it doesn't, but the fact that a particular
19 person was doing something at a particular time and was looking at
20 something at a particular time is not a fact that should be
21 judicially noticed by the court.

22 MJ: What the defense has asked me in the e-mail is to take
23 judicial notice that the book quotes the video verbatim at several

1 key points. Now, Government, you just said you object to me taking
2 judicial notice that there are quotes in the book that appear to be
3 the same as quotes in the video.

4 ATC[CPT MORROW]: No, Your Honor, if that is indeed the case.

5 MJ: Is the defense contesting that? I mean is the government
6 contesting that? Has the government done a comparison between the
7 video and the book?

8 ATC[CPT MORROW]: We did a comparison, Your Honor, and it
9 matched in some places and in other places it did not match.

10 MJ: All right, thank you.

11 [Pause] All right, anything further from the defense?

12 CDC[MR. COOMBS]: No, Your Honor.

13 MJ: Let's turn, then, to the Appellate Exhibit 316, which is
14 the defense supplement to the 3 August 2012 motion for judicial
15 notice, and the government's response at Appellate Exhibit 327, which
16 is dated 27 September 2012.

17 May I have the original motions, as well?

18 [There was a pause in the proceedings while the court reporter
19 located the exhibits.]

20 ADC[CPT TOOMAN]: Ma'am, that's 237 for the defense's original
21 motion and 238, I think, for the government's.

22 [The court reporter located the exhibits and handed them to the
23 military judge.]

1 MJ: All right, I have the original motions. The defense
2 motion was dated the 3rd of August, 2012; the government's motion was
3 dated the -- the government response was dated the 17th of August,
4 2012. This motion was originally scheduled to be litigated at the
5 last Article 39(a) session. It was; however, the defense the evening
6 before the litigation amended their filings and gave the court some
7 additional case law and added some bases for admissibility of the
8 public statements and the court necessarily required some time to
9 consider that, so the court asked the parties to file supplemental
10 responses and advised the parties that we would address this at
11 today's session.

12 Now, Defense, remind me. There was -- at the last
13 session, the defense also produced the letter from Senator Levin to
14 Secretary Gates and Secretary Gates's response back, as well as an
15 excerpt of a congressional proceeding.

16 ADC[CPT TOOMAN]: Yes, ma'am.

17 MJ: Is that part of your -- is that part of any of the
18 appellate exhibits I have in front of me?

19 ADC[CPT TOOMAN]: Yes, ma'am. Those were attachments to
20 Appellate Exhibit 316, so the congressional transcript would be
21 Attachment H.

22 MJ: To Appellate Exhibit, I'm sorry?

23 ADC[CPT TOOMAN]: To 316, ma'am.

1 MJ: 316 [retrieving exhibit].

2 ADC[CPT TOOMAN]: And the letters are Attachment C.

3 MJ: Okay. So is there any change from your supplement to

4 your original request on whose statements you want me to take

5 judicial notice of?

6 ADC[CPT TOOMAN]: May I, Your Honor?

7 MJ: Yes.

8 **[The assistant defense counsel approached the podium.]**

9 MJ: And I know this is a little bit awkward, but I'm going to

10 try to do it the same way I did last time; let's go person by person

11 here.

12 ADC[CPT TOOMAN]: Yes, ma'am.

13 MJ: I believe ----

14 ADC[CPT TOOMAN]: Okay, I think that we've agreed that A, B, and

15 C are admissible -- or appropriate for judicial notice; is that

16 correct?

17 ATC[CPT MORROW]: Yes; appropriate for judicial notice, yes.

18 MJ: So that would be Attachment A would be the statement by

19 Pentagon Press Secretary Geoff Morrell and Guantanamo Detention

20 Facility Ambassador Daniel Fried; is that correct?

21 ATC[CPT MORROW]: Yes, ma'am. And just to focus the issues for

22 the court, I don't think at this point judicial notice is necessarily

23 the issue with respect to the content of some of the statements. One

1 of the problems last time was that we were relying on sort of
2 secondhand sources for the content of statements. What the defense
3 has done in this supplement is they've sort of provided like the
4 actual transcript of the statement they want or the actual letter in
5 the case of Secretary Gates and the actual transcript of the press
6 release from Mr. Morrell, so judicial notice of the content of those
7 statements and the reliability of those statements, that issue can, I
8 think, be set aside somewhat, if the defense has filed that.

9 MJ: Okay, I'm getting confused again. Attachment A, I have a
10 news release and a *New York Times* article, so the *New York Times*
11 article is basically the news release or it's quoting the news
12 release.

13 ADC[CPT TOOMAN]: Right.

14 MJ: So if I take judicial notice of the news release, does
15 the defense request that I take judicial notice of the newspaper?

16 ADC[CPT TOOMAN]: No, Your Honor. That's just sort of there to
17 bolster the fact that the news release is -- was reported on; that's
18 what was said.

19 MJ: And this is something that emanated from the news release
20 from the Department of Defense, ----

21 ADC[CPT TOOMAN]: Yes, ma'am.

22 MJ: ---- and that's what the government's conceding to me at
23 this point.

1 ATC[CPT MORROW]: Yes, ma'am.

2 MJ: Okay. So does the government have any objection to me
3 taking judicial notice of the news release, not the *New York Times*
4 article, of -- statement of Pentagon Secretary Geoff Morrell and
5 Ambassador Fried?

6 ATC[CPT MORROW]: No objection to taking judicial notice of that
7 statement, yes, Your Honor.

8 MJ: Okay.

9 ATC[CPT MORROW]: But, again, then the second part of that would
10 be whether it's admissible under a various theory.

11 MJ: Well if I take judicial notice of it, then it's ----

12 ATC[CPT MORROW]: Well that goes back to -- that's why I said,
13 Your Honor, it would be better to address the second part rather than
14 the first part, the judicial notice part, because the real issue is
15 whether we're going to admit these statements for the truths of the
16 matter asserted essentially, the content of the statement. Again,
17 you can take judicial notice of the fact that a statement -- someone
18 made a statement at a particular time, but, again, the second part
19 would be -- and that's why -- and that's why the defense filed
20 originally under the way they filed is that they filed -- they asked
21 the court to take judicial notice of particular statements and then
22 they asked the court to admit those as the admissions of a

1 party-opponent, so there -- there's a second component there that has
2 to be addressed.

3 MJ: Okay. Well why don't we -- let's move this way then. So
4 I guess I misread the government response. You are -- you're going
5 to the evidentiary basis and you're -- you have objections to those
6 and, therefore, if they're not admissible, there's not an evidentiary
7 basis for admission; then the government is objecting to my taking
8 judicial notice? I'm a little confused.

9 ATC[CPT MORROW]: Your Honor, if that's the way that -- yes.

10 MJ: All right, well let's start -- let's do this. Let's --
11 the evidentiary basis for each of these is the statements, let's
12 start there.

13 ADC[CPT TOOMAN]: Yes, ma'am. Okay, I think that we can try to
14 streamline this. I think that A, B, C, D, E, and H, the evidentiary
15 basis is 803(8).

16 MJ: Okay, A, B, C, D, E, and H, so we are talking about Mr.
17 Morrell, and that's the press statement, right?

18 ADC[CPT TOOMAN]: Yes, ma'am.

19 MJ: Okay.

20 ADC[CPT TOOMAN]: And then Bravo is a White House press release.

21 MJ: By President Obama.

22 ADC[CPT TOOMAN]: Yes, ma'am.

23 MJ: So not ABC News.

1 ADC[CPT TOOMAN]: Correct.

2 MJ: Okay. Let's see. And -- yes?

3 ATC[CPT MORROW]: Can you repeat the attachments again or ask

4 the court -- the defense to repeat the attachments. I mean, this is,

5 then, a different theory now than what they filed in the supplement.

6 The initial theory was it's an admission of a party-opponent and then

7 here's this alternative theory and here's this other alternative

8 theory. So now if we can focus the issues again, they're all now

9 admissible under 803(8) (Alpha).

10 MJ: Okay, I'm going to change my mind, once again, and,

11 Defense, you just go ahead and start -- start to finish and then I'll

12 let the government go start to finish and then we'll ask questions.

13 I think it will work better that way.

14 ADC[CPT TOOMAN]: Yes, ma'am. And I'll try and group this as

15 logically as possible.

16 MJ: Okay, so let's -- okay so, A, we have the press statement

17 from Secretary -- or from Press Secretary Morrell coming out of the

18 DoD.

19 ADC[CPT TOOMAN]: Yes, ma'am.

20 MJ: B, we have a White House press release coming out of the

21 White House.

22 ADC[CPT TOOMAN]: Yes, ma'am.

23 MJ: So we don't want ABC News anymore.

1 ADC[CPT TOOMAN]: No, ma'am.

2 MJ: Okay.

3 C, we have ----

4 ADC[CPT TOOMAN]: The letter from Secretary Gates.

5 MJ: Okay. And the original request from Senator Levin, okay.

6 And you said D is also falling in that category?

7 ADC[CPT TOOMAN]: Yes, ma'am; that is the transcript from the

8 Department of Defense from a briefing.

9 MJ: And that would be in lieu of the 30 November 2010 *New*

10 *York Times* article?

11 ADC[CPT TOOMAN]: Yes, ma'am.

12 MJ: [Pause] And what was the other ----

13 ADC[CPT TOOMAN]: Echo, ma'am.

14 MJ: Okay, Echo is coming out of the Department of State and

15 that would be Secretary Clinton's ----

16 ADC[CPT TOOMAN]: Yes, ma'am.

17 MJ: In lieu of the *USA Today* 1 December 2010 article?

18 ADC[CPT TOOMAN]: Yes, Your Honor.

19 MJ: [Pause] Okay.

20 ADC[CPT TOOMAN]: And then H, Your Honor, which is the House

21 Judiciary Committee minutes or transcript from a hearing they had on

22 16 December; and we did not include the entirety because of the way

23 the defense structured its original motion was we asked for notice of

1 the quote from Representative Conyers. We can certainly provide this
2 transcript in its entirety if the court wishes, but we limited it to
3 the relevant portion.

4 MJ: [Pause] Does the rest of the hearing discuss this issue,
5 the WikiLeaks disclosures?

6 ADC[CPT TOOMAN]: Your Honor, I'm not sure. They may touch on
7 it. I'm not sure. We had focused in on Representative Conyers'
8 comment, so there may be -- it's certainly possible that other people
9 reference it.

10 MJ: Okay. I'd like to consider H separately, because with
11 the others, you have executive branch officials and here you have a
12 congressman, so let's ----

13 ADC[CPT TOOMAN]: Yes, ma'am.

14 MJ: ---- let's talk about the executive branch officials and
15 then let's move to the congressman.

16 ADC[CPT TOOMAN]: Okay. Your Honor, I think 803(8). These are
17 public records; very clearly they're reports of the activities of the
18 Department of State, the Department of Defense, the White House.
19 There's a hearsay exception for that.

20 [Pause]

21 ADC[CPT TOOMAN]: And it seemed in the government ----

22 MJ: So you're offering all of these for the truth of the
23 matter asserted.

1 ADC[CPT TOOMAN]: Yes, ma'am.

2 [Pause]

3 ADC[CPT TOOMAN]: And it seemed from the government response
4 that -- I may have read it wrong but it seemed that they acknowledged
5 that in their response; that at least A, B, and C would fall under
6 803(8).

7 MJ: Okay.

8 ADC[CPT TOOMAN]: Now the government did suggest that D and E
9 would not; their theory was that these press releases or these news
10 briefings were not for the purpose of talking about WikiLeaks and
11 then it came up. The defense's position is that nonetheless,
12 regardless of why you're there, they're making an official briefing;
13 they're fielding questions. They're certainly -- you know, in the
14 position they're in, they can handle questions on a variety of
15 topics, and in each case if you look at the transcript on page 6 of
16 Attachment D -- sorry about that, page 5, someone -- they even asked
17 Secretary Gates, then-Secretary Gates, can we ask you a non-Don't
18 Ask, Don't Tell question? He says sure. And so then they asked the
19 question. So this idea that it's not an official report because they
20 weren't there to talk about WikiLeaks, it doesn't hold water.
21 Certainly the Secretary of Defense, the Secretary of State can speak
22 about things relating to their Departments at any time. When they do
23 so on the record and that transcript is then provided as an official

1 release, that is, I think, clearly the activities of that office and
2 that agency.

3 MJ: For D and E, are you looking at these for -- I mean,
4 these could potentially come in, in different ways. They could ----

5 ADC[CPT TOOMAN]: Sure.

6 MJ: ---- come in for as truth of the matter asserted or they
7 could come in for the fact that this was -- they were said; this was
8 the government's posture at the time.

9 ADC[CPT TOOMAN]: Sure.

10 MJ: But those would be -- require different instructions to
11 the fact finder.

12 ADC[CPT TOOMAN]: Yes, ma'am.

13 MJ: Is the defense asserting that they are admissible for
14 both reasons or just for the truth of the matter asserted?

15 ADC[CPT TOOMAN]: No, we would say that they are certainly
16 admissible for both reasons. Our preference would be under 803(8),
17 truth of the matter asserted. We would argue in the alternative,
18 Your Honor, that they are admissible just for the fact they were
19 said, as non-hearsay, not for the truth of the matter asserted, but
20 that would be a secondary or tertiary argument.

21 MJ: So in all of these, you're going with the Department --
22 in D now, instead of going with the caucus, we are talking about --
23 you want the news transcript from the DoD Web site; is that right?

1 ADC[CPT TOOMAN]: Yes, ma'am.

2 MJ: Okay.

3 ADC[CPT TOOMAN]: And really the request is the specific quote
4 that the defense cited in their motion, but the transcript seems to
5 be -- would seem to alleviate government's concerns about context and
6 making sure that the fact finder can see everything that was said.

7 MJ: Okay. [Pause] Before we continue, I'm just getting my
8 copy so I can write on it.

9 ADC[CPT TOOMAN]: Yes, ma'am.

10 **[There was a pause in the proceedings while the military judge**
11 **retrieved her copy of the exhibit.]**

12 MJ: So Attachment D, you're looking at the quote there on
13 page 6, then, "Let me offer some perspective"?

14 ADC[CPT TOOMAN]: Yes, ma'am. And more specifically towards the
15 bottom, beginning with "Now I've heard the impact of these releases
16 on our foreign policy described as a meltdown is a game changer. I
17 think that those descriptions are fairly significantly overwrought,"
18 so the paragraph that starts with that, but certainly we would ask
19 for ease the court to take judicial notice of the entire transcript
20 and focus the fact finder in on -- if the court would prefer, we can
21 just take the specific quote, but if the government wants there to be
22 context and the fact finder to have a complete transcript, the
23 defense doesn't have an issue with that.

1 MJ: All right, and your -- you believe this is admissible

2 under what theory?

3 ADC[CPT TOOMAN]: 803(8) would be the primary theory, Your
4 Honor.

5 MJ: **[Pause]** Do you have any authority for that?

6 ADC[CPT TOOMAN]: The plain reading of the rule, Your Honor.

7 MJ: Any case law in that respect at all?

8 ADC[CPT TOOMAN]: **[Pause]** One moment, Your Honor. **[Reviews**
9 **documents]** The defense cited *Berg v. ABC Professional Tree Service*.
10 There they found that a Department of Labor press release fell within
11 the exception, as well as *Zeigler v. Fisher-Price*, the cases cited by
12 the defense, Your Honor.

13 MJ: Okay. Now in your pleadings you also rely on -- so
14 you're not -- the portion of your pleadings, then, statements
15 appearing in newspaper articles are admissible under 806 -- 803(6)
16 and (7). Since we're not talking about new -- are any of your --
17 what you want me to take judicial notice of newspaper articles?

18 ADC[CPT TOOMAN]: Yes, ma'am. F and G are newspaper articles.

19 MJ: Okay, so we'll -- so the portion of your argument under
20 Section C under 803(6) and 807 deals exclusively with F and G; is
21 that correct?

22 ADC[CPT TOOMAN]: Yes, ma'am.

1 MJ: Okay. So let's go back to the other ones, then. So the
2 other ones here you want to admit under 803(8).

3 ADC[CPT TOOMAN]: Yes, ma'am.

4 MJ: What about 801(d)(2) that's in here?

5 ADC[CPT TOOMAN]: That would be the secondary position of the
6 defense, Your Honor. We believe that these are statements by a
7 party-opponent and these were made within the scope of these
8 individuals' capacity in their employment and so this should be
9 admissible as non-hearsay, Your Honor.

10 MJ: The case law -- I'm trying to remember which case I'm
11 looking at now -- one of them talked about the distinction between an
12 admission of a party-opponent and sort of a binding admission of a
13 party-opponent.

14 ADC[CPT TOOMAN]: Uh-huh **[affirmative response]**.

15 MJ: What is the -- is the defense seeking the statements as
16 an admission of a party-opponent, which the government is free to
17 rebut, or is that evidence against that; or is the government -- or
18 the defense seeking to say this binds the government?

19 ADC[CPT TOOMAN]: Well we would say that certainly the
20 government could rebut -- could put forth whatever evidence they want
21 to say that, you know, there are these quotes that say there was no
22 damage. The government, I'm sure, will put on, you know, if we get
23 to a sentencing phase, the government, I'm sure, will put on evidence

1 that there was damage. Now the defense's reading of the rule is that
2 if they're made by an individual with the ability to bind the party,
3 and so the defense's position is the Secretary of State can bind the
4 government. She has that ability.

5 MJ: With his -- with her opinion? She's binding the
6 government with her opinion?

7 ADC[CPT TOOMAN]: She has the ability to bind the government
8 through her actions and through her diplomacy. Likewise, the
9 Secretary of Defense has the ability to bind the government.

10 MJ: Okay, what's your support for that?

11 ADC[CPT TOOMAN]: I think the best case the government cites is
12 -- or that the defense cites is *Van Griffin*, and in *Van Griffin* you
13 have a case where it's a DUI case and they admit as an admission of a
14 party-opponent a field sobriety manual produced by the Department of
15 Transportation in the state, and they said that since this crime,
16 this alleged crime relates to the roadways and things, the Department
17 of Transportation is a party-opponent. This is their manual that
18 binds them, and this is admissible under 808(d)(2) [sic] --
19 (d)(2)(D), and so that supports the defense's position that the
20 Department of State is certainly a party-opponent here and that's
21 another issue that I'm sure we'll talk about ----

22 MJ: You've got one case that expands the party-opponent to
23 multiple entities, and other than that case, and as the government

1 said the police prosecution scenarios where they're arguing in Case 1
2 that A was the shooter and they're arguing in Case 2 that B was the
3 shooter and the courts have said you can't do that, ----

4 ADC[CPT TOOMAN]: Right.

5 MJ: ---- what -- is there any other authority that goes
6 beyond, I guess, saying that closely aligned agencies are parties?

7 ADC[CPT TOOMAN]: Well there's also the AT&T case, which the
8 defense acknowledges is a civil case. The defense's position is that
9 certainly if the govern -- or certainly if the courts are willing to
10 expand the definition in the civilian context or in the civil
11 context, it would be appropriate in the criminal context where a
12 person's liberty is at stake. Now as the government often points
13 out, this is a very, you know, interesting case; it's complex. These
14 issues haven't really been addressed. No one's been charged the way
15 PFC Manning's ever been charged, and so there's not a lot of case law
16 to support it.

17 MJ: Okay, so we have now 8-0 -- you're first looking at it as
18 a public record, and now we're looking at it as a potential admission
19 by a party-opponent that defense believes should be binding.

20 ADC[CPT TOOMAN]: Yes, Your Honor.

21 MJ: Okay.

22 ADC[CPT TOOMAN]: That's correct.

1 And then finally, Your Honor, would be as non-hearsay,
2 not for the truth of the matter asserted, just that they were said.
3 MJ: Okay. So that's A, B, C, D, and H.
4 ADC[CPT TOOMAN]: The E; I'm not sure if you said E.
5 MJ: Oh, E; E is in there too? E is the news transcript,
6 okay.
7 ADC[CPT TOOMAN]: Yes, ma'am, from the Department of State; and
8 I think you had wanted to talk about H separately, which was ----
9 MJ: Yes; oh, that's right. H is the ----
10 ADC[CPT TOOMAN]: Yes, ma'am.
11 MJ: So let's talk about H.
12 ADC[CPT TOOMAN]: Okay. So H, again, Your Honor, 803(8). It's
13 a public ----
14 MJ: Well how do you get -- well what's relevant about this
15 statement; why [pause] ----
16 ADC[CPT TOOMAN]: Well presumably in any sentencing phase that
17 occurs, the government's going to put forth evidence of damage.
18 Representative Conyers talks about how this is being overblown and
19 cites Secretary Gates's comments.
20 MJ: So I -- so you -- is the defense's position you can call
21 everybody under the sun to opine whether this is overblown? What's
22 the basis for opining that?

1 ADC[CPT TOOMAN]: His basis for opining that, I would assume, is
2 his position in the House and his experiences there and what he sees
3 and due to the course of his representation of his constituents.
4 It's also relevant as to -- certainly one of the issues is going to
5 be the way things are classified and he discusses that as well, Your
6 Honor.

7 MJ: [Pause] Now say I admit this under a -- are you going
8 under the public records again?

9 ADC[CPT TOOMAN]: Yes, ma'am.

10 MJ: If I admit this under a public record, what happens if
11 there are congressional hearings that say -- that address WikiLeaks
12 and say something that you don't like, is that admissible in rebuttal
13 from the government?

14 ADC[CPT TOOMAN]: I would think so, Your Honor.

15 MJ: Okay. All right, are you also going for the fact that it
16 was said if I don't admit it for the truth of the matter asserted?

17 ADC[CPT TOOMAN]: Yes, ma'am.

18 MJ: Okay. Any other basis with respect to the statement of
19 Mr. Conyers?

20 ADC[CPT TOOMAN]: No, Your Honor.

21 MJ: Okay. And what do we have left? We have ----

22 ADC[CPT TOOMAN]: We have F.

23 MJ: Is that Vice President Biden?

1 ADC[CPT TOOMAN]: That is G. We can talk about that, Your
2 Honor.

3 MJ: Oh, that's G. Okay, let's look at F.

4 ADC[CPT TOOMAN]: Okay. F is ----

5 MJ: Well F and G are both newspaper articles, right?

6 ADC[CPT TOOMAN]: They are, Your Honor.

7 MJ: And is it still the defense's position that those are
8 business records?

9 ADC[CPT TOOMAN]: Yes, Your Honor.

10 MJ: Would you agree that most of the case law is against you
11 in that respect?

12 ADC[CPT TOOMAN]: I would agree that those case law -- the case
13 law cited by the government did not specifically address the business
14 records exception.

15 MJ: Okay. So you want to introduce them as a business
16 record, all right.

17 ADC[CPT TOOMAN]: And then in the alternative, Your Honor, ----

18 MJ: So if you want to introduce something out of the *People*
19 magazine, *People* magazine's business is to publish magazines, so is
20 all that admissible as a public record exception to the hearsay rule?

21 ADC[CPT TOOMAN]: I think that if there's indicia of reliability
22 they are, and I think in this particular request by the defense, Your
23 Honor, you have three separate news outlets, CNN, *New York Times*, and

1 the UPI, each of which -- now despite what the government says,
2 they're not quoting Secretary Clinton differently. They may have
3 selected different quotes from Secretary Clinton, but each of them
4 includes at least one quote from Secretary Clinton that is included
5 in one of the other articles, so what I mean by that is if you look,
6 for example, at the CNN article, it says this shows diplomats --
7 quote, diplomats doing the work of diplomacy. What you see in the
8 *New York Times* article, they have that exact verbiage in there,
9 "diplomats doing the work of diplomacy." Look at the UPI article,
10 "diplomats doing the work of diplomacy," and so when you have three
11 separate news outlets both reporting on the same thing, in the same
12 way, there is -- you can rely on it. There's -- it's highly unlikely
13 that they are just fabricating these quotes from the Secretary of
14 State, which seems to be what the government is suggesting.

15 [Pause] So to answer your question, Your Honor, if *People*
16 magazine included a quote from Secretary Clinton that was also quoted
17 in, I don't know, *US Weekly*, then, sure, it would be reliable,
18 because if you have multiple news sources it's likely that it's
19 reliable if multiple news sources are reporting the same thing.

20 MJ: [Pause] What is the case law focusing on reliability
21 versus an 803(6)? I mean it's either a business record or it's not,
22 right?

1 ADC[CPT TOOMAN]: Yes, Your Honor. I just anticipate that that
2 would be -- that it certainly has been something that the government
3 if they haven't said explicitly they've certainly implied that, you
4 know, we don't know that these things were actually said.

5 MJ: So I'd be looking at sort of a 403 analysis in that
6 respect.

7 ADC[CPT TOOMAN]: Yes, Your Honor.

8 MJ: Okay.

9 All right, and then what's G here?

10 ADC[CPT TOOMAN]: G is a transcript of a conversation between
11 NBC's Andrea Mitchell and the Vice President.

12 MJ: And you're introducing this as a business record as well?

13 ADC[CPT TOOMAN]: Yes, Your Honor.

14 MJ: Okay, so same. Is this a transcript or is this something
15 you can visually see?

16 ADC[CPT TOOMAN]: I'm sorry, Your Honor?

17 MJ: Is this -- are you introducing the transcript or is this
18 something -- is there a video clip of it on a television?

19 ADC[CPT TOOMAN]: I'm not sure if there's a video clip of it or
20 not, Your Honor.

21 MJ: Okay. But here you don't know if there were excerpts out
22 or anything of that nature; you can't tell.

23 ADC[CPT TOOMAN]: Correct, Your Honor.

1 MJ: Okay, and same for the last article. Is there more than
2 one of G?

3 ADC[CPT TOOMAN]: No, Your Honor.

4 MJ: **[Pause]** You're also saying -- is there an additional
5 basis for your looking at the newspaper articles?

6 ADC[CPT TOOMAN]: With respect to -- yes, Your Honor, with
7 respect to G and -- F and G, I would also say 807.

8 MJ: Okay. So you've got one case here from 1901 to show that
9 a clock tower had caught fire in the past. So here it's not an
10 opinion of somebody; it's a fact; is that what -- okay.

11 Any additional case law that you're aware of?

12 ADC[CPT TOOMAN]: The Reese case as well, Your Honor, which
13 appears before the 1901 case, where you had a hospital creating a
14 scrapbook of newspaper articles.

15 MJ: Okay. Well it's a scrapbook of newspaper clippings.

16 ADC[CPT TOOMAN]: Yes, Your Honor.

17 MJ: **[Pause]** Okay. All right, and then you have your backup
18 if you find that one of the theories advanced above are admissible
19 not to show that they actually did cause harm but to demonstrate that
20 government officials asserted the U.S. position as such.

21 Now with respect to the newspaper articles and if I don't
22 find them to be business records you're still in the hearsay within
23 hearsay, even assuming you find that the statements of Mr. Biden and

1 Secretary -- Vice President Biden and Secretary Clinton are not
2 hearsay, you still have the hurdle of the newspaper.

3 ADC[CPT TOOMAN]: Yes, ma'am.

4 MJ: And that's -- what's the defense's position with that?

5 ADC[CPT TOOMAN]: The defense's position with that would be 807,
6 the residual exception, and so there you've got it's a material fact
7 and it would be in the interest of justice to admit it. Certainly,
8 what I imagine you're thinking and what the government is probably
9 thinking is, well, you can call that individual to testify.

10 MJ: For point B, yes.

11 ADC[CPT TOOMAN]: Right, for you can't get this through any
12 other reasonable efforts.

13 MJ: More probative on the point than any other evidence that
14 the proponent can procure through reasonable efforts.

15 What's the defense's position on that?

16 ADC[CPT TOOMAN]: The defense's position is that those
17 individuals who were requested and denied at the Article 32 and the
18 Secretary of State and the Vice President probably don't need to come
19 here and testify.

20 MJ: No, no, no, no. I'm not talking about them. I'm talking
21 about the reporters.

22 ADC[CPT TOOMAN]: Oh ----

1 MJ: Because we're at the hearsay within hearsay stage,
2 assuming that their statements come in -- that you're having them for
3 a non-hearsay basis, the fact that they were said. You still have
4 the newspaper hurdle for the first prong of the hearsay.

5 ADC[CPT TOOMAN]: Yes, Your Honor.

6 MJ: So ----

7 ADC[CPT TOOMAN]: So the reporter ----

8 MJ: ---- the reporter ----

9 ADC[CPT TOOMAN]: ---- would need -- the reporter would need to
10 come and testify.

11 MJ: Okay. [Pause] Okay.

12 ADC[CPT TOOMAN]: And then finally just not for the truth of the
13 matter asserted, Your Honor, but that they were said.

14 MJ: All right, and then, finally, let's talk about -- this is
15 in sentencing -- if the rules are relaxed, and that's the rules as to
16 hearsay and authentication, not relevance, the defense's position,
17 then, is that each statement should be admissible.

18 ADC[CPT TOOMAN]: And I think the government agreed on that in
19 their reply -- or response, Your Honor, is that under relaxed rules
20 these would be admissible. I'm sure they will correct me if I have
21 misstated their position.

22 ATC[CPT MORROW]: With the exception of Attachment F.

1 [The military judge made gesture to indicate that she did not hear
2 response.]

3 ATC[CPT MORROW]: With the exception of Attachment F.

4 MJ: Okay, well we'll talk about that when we get to your
5 position, okay.

6 Anything else?

7 ADC[CPT TOOMAN]: Subject to your questions, ma'am.

8 MJ: I think I just asked them, thank you.

9 ADC[CPT TOOMAN]: Thank you, ma'am.

10 [The assistant trial counsel approached the podium.]

11 MJ: All right, Government, hold on just a second. I want to
12 make sure I've got my copy of your response so I can write on it as
13 well.

14 ATC[CPT MORROW]: Yes, ma'am.

15 [Pause]

16 MJ: All right, go ahead.

17 ATC[CPT MORROW]: I don't know how you want to go through this,
18 ma'am, but we can certainly ----

19 MJ: Why don't we try to do it -- well, why don't you go
20 through it ----

21 ATC[CPT MORROW]: Just do it the same way?

22 MJ: ---- the same way or if you've got the presentation
23 already prepared, just go ahead.

1 ATC[CPT MORROW]: I don't, but with respect to Attachments A, B,
2 and C, [pause] ----

3 MJ: Uh-huh [affirmative response].

4 ATC[CPT MORROW]: ---- the government conceded that -- in its
5 motion that those would be admissible -- portions of those would be
6 admissible under M.R.E. 803(8).

7 MJ: Now you're saying "portions" of them.

8 ATC[CPT MORROW]: Right, and what I mean by that, ma'am, is that
9 803(8) still requires the statement to set forth the activities of
10 the office, and one of the things you highlighted with Captain Tooman
11 just now is that a lot of these statements really don't set forth the
12 activities of the office or agency in the sense that within the
13 meaning of the rule and that's the government's position on that.
14 For example, if you look at the Secretary Gates' statement on
15 Attachment C, Secretary Gates states that, you know, I've directed
16 DIA to form an Information Review Task Force to assess the damage,
17 yada, yada, yada, blah, blah, blah; that would be a statement that
18 would potentially be admissible under 803(8) because it sets forth
19 the activities of that office, the Office of the Secretary of
20 Defense, or the Department of Defense; but other portions of that
21 statement really don't set forth the activities of the office.
22 They're opinions. They are essentially adversarial. [Pause] The
23 government wasn't able to find any cases directly on point except for

1 -- we cited *United States v. Yeoman* in its brief [pause] for the
2 proposition that 803(8) (Alpha) is designed as a tool to allow into
3 evidence public records and documents not prepared for the purposes
4 of litigation. So it's sort of a -- it's similar to 803(6) in that
5 respect.

6 MJ: What's the government's position with the backup position
7 of the defense that even if they're not admitted for the truth of the
8 matter asserted, it's admissible for a non-hearsay basis for the fact
9 that it was said and this was apparently the position of the
10 Department of Defense at the time?

11 ATC[CPT MORROW]: Our position, Your Honor, is that wouldn't be
12 relevant ----

13 MJ: Why not?

14 ATC[CPT MORROW]: ---- on sentencing. The inquiry on sentencing
15 is whether or not the accused's misconduct caused damage or did not
16 cause damage in any particular way. Whether or not the public
17 position of the Department of Defense at the time was that damage did
18 or did not occur is not relevant to that inquiry on the pre -- at the
19 presentencing phase. It may be relevant for other reasons, off the
20 top of my head I can't really think of one, but certainly not for
21 mitigation.

22 [Pause]

1 ATC[CPT MORROW]: The government will just note for the court as
2 well that -- or we made objections on the basis of 403 for several of
3 the attachments and that particular objection's likely been overcome
4 by events, the confusion and misleading, Your Honor.

5 MJ: Okay. How would it be confusing and misleading to
6 introduce statements of the Secretaries of State and Defense?

7 ATC[CPT MORROW]: Well in that respect I'm referring to sort of
8 the content of those statements, so if, for example, there's a
9 statement from Mr. Morrell from the Department of Defense, at
10 Attachment A, ----

11 MJ: Uh-huh **[affirmative response]**.

12 ATC[CPT MORROW]: ---- and he says, you know, "The Guantanamo
13 Review Task Force established in January 2009 considered the DABs
14 during its review of detainee information. In some cases the task
15 force came to the same conclusions as the DABs. In other instances,
16 the review task force came to different conclusions based on updated
17 or other available information. The assessments of the Guantanamo
18 Review Task Force have not been compromised to WikiLeaks as well as
19 any given DAB illegally obtained and released by WikiLeaks may or may
20 not represent the current view of a given detainee"; that doesn't
21 really speak to damage or lack thereof. That's the government's
22 position.

23 MJ: So what about the rest of the ----

1 ATC[CPT MORROW]: Attachment B, I mean, it would be sort of the
2 same thing, President Obama.

3 MJ: Let's look at Attachment A.

4 ATC[CPT MORROW]: Okay.

5 MJ: What part of the Attachment A does the government believe
6 is admissible as -- under 803(c) -- or 8-0 -- I'm sorry -- 8-0 ----

7 ATC[CPT MORROW]: 803(8).

8 MJ: 8.

9 ATC[CPT MORROW]: Well that was -- the government believes it's
10 admissible as a record of a public office, but if you make the
11 determination that it's also relevant and not misleading or
12 confusing, then, yes, it's admissible -- the statement itself is
13 admissible.

14 MJ: I thought you just argued to me that paragraph 3 was not
15 relevant.

16 ATC[CPT MORROW]: Well it may be relevant in the sense that it
17 discusses documents that are at issue in this case, but whether or
18 not those documents -- the compromise of those documents did or did
19 not cause damage is not, at least in our -- in the government's
20 example, that's not really discussed here. What is discussed is that
21 the information in a DAB may or may not mirror what was in the
22 reviews by the Guantanamo Review Task Force, which is a separate

1 entity, compromised to deal with the continuing issue of detainees at
2 Guantanamo.

3 MJ: Okay. Let's look at Enclosure B then.

4 ATC[CPT MORROW]: I think this is sort of similar to Attachment
5 A, ma'am. It's a statement by President Obama. "I also urge the
6 house leaders to pass the necessary funding to support our efforts in
7 Afghanistan and Pakistan. I know how much -- I know much has been
8 written about this in recent days as a result of a substantial leak
9 of documents from Afghanistan covering a period from 2004 to 2009,"
10 so, again, there's sort of marginal relevancy there if we're talking
11 about it in terms of it discusses information that's at issue in this
12 case. President Obama continues, "While I'm concerned about the
13 disclosure of sensitive information from the battlefield that could
14 potentially jeopardize individuals or operations, the fact is these
15 documents don't reveal any issues that haven't already been --
16 informed our public debate on Afghanistan. Indeed they point to the
17 same challenges that led me to conduct an extensive review of our
18 policy last fall." The government's position, at least the way we
19 read that, is that these documents were considered. They were for
20 the purposes of the administration's policy with respect to the war
21 in Afghanistan, but not necessary -- but, again, that's a statement
22 that doesn't really lead one to conclude that the compromise of those
23 documents did or did not cause damage.

1 MJ: Okay.

2 C?

3 ATC[CPT MORROW]: C, I believe we -- again, we think it's ----

4 MJ: C are the letters back and forth.

5 ATC[CPT MORROW]: ---- admissible as -- under 803(8) (Alpha),

6 portions of it at least, and it does -- it actually does discuss --

7 the government concedes that it does discuss damage to a particular

8 -- to a discrete issue, namely, Secretary of State, but that "the

9 initial assessment in no way discounts to its national security;

10 however, the review of the date has not revealed any sensitive

11 intelligence sources or methods compromised by this disclosure."

12 MJ: Okay, so the government, if I'm understanding, ----

13 ATC[CPT MORROW]: We concede that would be ----

14 MJ: That's admissible under 803(8).

15 ATC[CPT MORROW]: Yes, ma'am.

16 MJ: Okay.

17 All right, D.

18 ATC[CPT MORROW]: D and E can kind of be dealt with in the same

19 way, ma'am. The government's position with respect to those two

20 attachments is that they are not statements or records that set forth

21 the opportunities of the office or agency. As we described in our

22 brief, they are news conferences convened to discuss entirely

23 separate matters. In the case of Attachment D, it's a news

1 conference to discuss the implementation of the repeal of Don't Ask,
2 Don't Tell. In the case of Attachment E, it's a news conference
3 discussing the strategic partnership between the United States and
4 Kazakhstan.

5 MJ: All right, assume -- well, first, what's the government's
6 position on residual hearsay?

7 ATC[CPT MORROW]: With all of them, ma'am?

8 MJ: No, with the newspaper articles.

9 ATC[CPT MORROW]: Well that sort of leads us to an interesting
10 point because the -- as we discussed in our brief, the government
11 understood the court's direction last time to address the newspaper
12 article issue as sort of one thing, which is you've got the newspaper
13 article, which is admissible under, according to the defense, under
14 803(6) and then whatever statements are in the newspaper article are
15 admissible under the residual hearsay exception.

16 MJ: Uh-huh **[affirmative response]**.

17 ATC[CPT MORROW]: At least that's -- we read the brief, they
18 were sort of saying one thing -- the two levels of hearsay into one,
19 so 803(6) and then 807, so there's like two separate arguments. As
20 you noted, you've got to get sort of past -- you have to get past two
21 levels of hearsay there.

22 Our position with respect to the 807 is, as you noted, a
23 lot of these aren't really evidence of a material fact, but

1 additionally there's actually more probative evidence out there than
2 these news transcripts.

3 MJ: More probative evidence of what the defense is trying to
4 assert?

5 ATC[CPT MORROW]: Right, what they're trying to get at, which is
6 the alleged disclosures did not cause damage.

7 MJ: So I'm going to ask you the same question I asked the
8 defense. Assume that I admit -- that I find that the statements
9 themselves by Secretary Clinton and Vice President Biden are not
10 hearsay. They're offered for -- not for the truth of the matter
11 asserted but for the government's position at the time -- or the
12 government's public position at the time. What is the government's
13 position on the first level of hearsay, the newspaper?

14 ATC[CPT MORROW]: Our position is that newspaper articles are
15 not business records as contemplated by 803(6), especially not
16 Internet news articles.

17 MJ: So if the defense puts these reporters on their witness
18 list ----

19 ATC[CPT MORROW]: Yeah, I think the government's brief or at
20 least the cases cited by the government, the Larez case in
21 particular, discusses that very scenario, where if the government had
22 put the reporters on the stand to discuss what the chief of police in
23 LA had said, then, yes, that would have satisfied the hearsay issue,

1 because in that case, the chief of police was a party-opponent, but
2 that goes back to our position on party-opponents, which is that none
3 of these people are party-opponents.

4 MJ: Does the government see a distinction -- again, you're
5 talking about if the statements are admissible and I find that
6 Secretary Clinton, Secretary Gates, Vice President Biden, or any one
7 of them is a party-opponent, then the statement would be admissible
8 for the truth of the matter asserted.

9 Now assume that I don't find that they're a
10 party-opponent. Is it still admissible not for the truth of the
11 matter asserted but for the public position espoused by high
12 officials of the United States and the agencies affected at the time?

13 ATC[CPT MORROW]: The government's position is that even if the
14 statements are offered for -- not for the truth of the matter
15 asserted that in particular that issue is not relevant to -- the
16 public position of various officials at various times is not relevant
17 to the inquiry of whether or not the pledged disclosures and
18 misconduct did or did not cause damage.

19 MJ: So it's the government's position that that would not be
20 circumstantial evidence that there was a lack of damage or less
21 damage in the case?

22 ATC[CPT MORROW]: Well if the position is that that was the
23 public ----

1 MJ: For circumstantial evidence of damage.

2 ATC[CPT MORROW]: Well, no, because if the -- if the non-truth
3 reason is that the government's public position was that there was no
4 damage, then that would lead you to the opposite conclusion, which is
5 that there was damage.

6 MJ: Okay, I don't think I'm following that.

7 ATC[CPT MORROW]: Okay. I'm not sure I'm following either.

8 MJ: I mean do you understand what I ----

9 ATC[CPT MORROW]: If the non-truth -- I understand, ma'am. If
10 the non-truth reason is that the government's position at the time
11 was that X official said there was no damage that the public position
12 of a certain agency or of an official was that there was no damage.

13 MJ: Well that's not exactly what these articles are saying.
14 They're saying ----

15 ATC[CPT MORROW]: Right; that's not even what they say.
16 Obviously, they say other things, you know, as we discussed earlier,
17 but if the public position is that -- if the defense position is that
18 the non-truth reason for the statements that the government had an
19 official position that was not -- that was something -- their
20 official position was X, that is not necessarily relevant to the
21 inquiry of whether or not the accused's misconduct did or did not
22 cause damage.

23 MJ: Okay. I got -- I have the government's position, yes.

1 ATC[CPT MORROW]: So that sort of deals with D and E.

2 F, the government's understanding is that the defense

3 wants to admit that under 803(6) and 807 or some combination of those

4 two. Again, our position is that those aren't newspaper articles,

5 number one; number two, that the newspaper articles do not constitute

6 a business record and in fact are ----

7 MJ: So, wait a minute, your position is F is not a newspaper

8 article?

9 ATC[CPT MORROW]: F is, I believe, a CNN.com ----

10 MJ: So it's not a -- it's a Web ----

11 ATC[CPT MORROW]: It's a Web, Internet news something ----

12 MJ: So if you turn to CNN, which is a news outlet, it is ----

13 ATC[CPT MORROW]: Yes, ma'am.

14 MJ: ---- an emotion by a new -- or an emoting by a news

15 outlet but not a newspaper article.

16 ATC[CPT MORROW]: Well if ----

17 MJ: A posting by a news outlet.

18 ATC[CPT MORROW]: It's a posting by -- and I guess I'd go back -

19 - I guess if this is kept in the regular course of business, these -

20 - all these postings ----

21 MJ: Well I guess do you see a distinction between, say, the

22 *Washington Post* put something in print or they put it -- or something

23 on the Internet ----

1 ATC[CPT MORROW]: Right. I ----
2 MJ: ---- when you pull up washingtonpost.com?
3 ATC[CPT MORROW]: Well, again, that would be a news -- that
4 would actually be a newspaper. I don't think CNN necessarily -- as
5 far as I know they don't have a repository -- well, they may have a
6 repository of past articles but they're not published regularly in
7 sort of the way that a hard copy newspaper is published regularly.
8 MJ: So is there a distinction for purposes, then, of -- well,
9 I mean, it's the government's position whether they're newspaper
10 articles or not they don't fall under 803(6); is that correct?
11 ATC[CPT MORROW]: Yeah, I think that's -- that's probably the
12 better way to think of this, ma'am, is that it's just not a -- it's
13 not a business record within the meeting of 803(6).
14 MJ: But is the government arguing that there is a distinction
15 between a hard copy newspaper and CNN posting something like they
16 regularly do of events that happened during the day when you go on
17 CNN.com and, you know, you see the news feeds changing as the day
18 progresses?
19 ATC[CPT MORROW]: For purposes of this litigation, ma'am, the
20 government, I guess, doesn't see a difference between those two.
21 MJ: So the analysis would be the same.
22 ATC[CPT MORROW]: Analysis would be the same, yes, ma'am.
23 MJ: And that would be for F and G?

1 ATC[CPT MORROW]: Well, G is sort of a different beast, because
2 G is a -- I'm not even sure it's -- it's a transcript or excerpts of
3 a transcript of an interview between Andrea Mitchell and Vice
4 President Biden, so it's not even really a newspaper article.
5 MJ: **[Pause]** So it's an interview.
6 ATC[CPT MORROW]: It's an interview, yes, ma'am; an interview
7 apparently pulled from msnbc.msn.com.
8 MJ: In the government's brief, the government -- you said
9 that the government is not contesting the fact that these things were
10 said; is that the government's position?
11 ATC[CPT MORROW]: Yes, ma'am.
12 MJ: So **[pause]** ----
13 ATC[CPT MORROW]: In short, really if, I mean, if I can
14 summarize this in one sentence, the government's position is that
15 there really is no precedent for what the defense is trying to do
16 with the, you know, the statements of ten different people in various
17 news outlets and various proceedings, trying to get those admitted
18 for the truth of the matter -- truth of the matter asserted. There's
19 really no precedent.
20 MJ: I see ----
21 ATC[CPT MORROW]: It's the government's larger -- largest
22 position.
23 MJ: Well does the ----

1 ATC[CPT MORROW]: And so if the ----
2 MJ: Okay ----
3 ATC[CPT MORROW]: ---- Rules of Evidence are relaxed, then, yes,
4 that could potentially be a way to have that information considered
5 by the trier of fact.
6 MJ: So does the -- does the government agree with the defense
7 that if the rules are relaxed for hearsay and authentication that
8 these statements can come in for the truth of the matter asserted?
9 ATC[CPT MORROW]: Yes, ma'am.
10 MJ: Okay. And at this point the government's not contesting
11 number C and then parts of A and B that's coming in under 803(C)
12 [sic]?
13 ATC[CPT MORROW]: Yes; that goes back to -- that goes back to
14 our argument that 803(8) ----
15 MJ: 803(6), excuse me, yeah.
16 ATC[CPT MORROW]: ---- that 803(8) is meant to admit the
17 portions of -- or statements that set forth the activities of a
18 public office, not necessarily the opinions, like, for example -- I
19 mean, the best example would be if the House Judiciary Committee
20 released a report on the diversity of federal judges; that would be
21 the record of a public office or of a commission that would be
22 admissible under 803(8). I mean that's sort of a -- that's kind of
23 the best example of that.

1 MJ: So facts versus opinions is where you're looking at this.

2 ATC[CPT MORROW]: Right; yes, ma'am.

3 MJ: Okay.

4 ATC[CPT MORROW]: Findings of fact, yes.

5 And that actually kind of is a good segue into Attachment
6 H, which is the statement of Representative Conyers. As the
7 government noted, first, as you -- well as the court noted, it's a
8 separate branch of government, it's the legislative branch, so it
9 wouldn't be admissible as the admission of a party-opponent if the
10 court was going to go that way.

11 Secondly, if the government -- or if the defense argument
12 is that it's admissible under 803(8), which is the public records
13 exception, but in that case what we're talking about here is the
14 statement of one particular representative at a House Judiciary
15 Committee meeting, not necessarily the statement of the House
16 Judiciary Committee, as I just sort of addressed.

17 MJ: Does the gov -- has the government looked at the rest of
18 this? Apparently, the hearing is about Espionage Act and legal and
19 constitutional issues raised by WikiLeaks.

20 ATC[CPT MORROW]: And there's -- and I think there are relevance
21 issues there as well, ma'am, because the statement that the defense
22 wants admitted says, "We are too quick to accept government claims
23 that are a risk to national security and far too quick to forget the

1 enormous value of some national security leaks." That's sort of an
2 extemporaneous statement about the state of affairs as Representative
3 Conyers sees them, not necessarily relevant to any inquiry in this
4 case.

5 MJ: Has the government looked at the remaining portion of
6 this hearing?

7 ATC[CPT MORROW]: We haven't, Your Honor. I haven't read
8 through the entire transcript.

9 MJ: Going back, assuming that the congressional record, would
10 the government agree, that that's a public record, the congressional
11 hearing?

12 ATC[CPT MORROW]: A congressional hearing, ma'am?

13 MJ: Well the congressional hearing before the Committee on
14 the Judiciary, Office of Representatives.

15 ATC[CPT MORROW]: Right, and I think the -- well the distinction
16 for the -- at least for the government's -- from the government's
17 perspective is that a -- for example, if the -- Representative
18 Conyers was reading the report of the Judiciary Committee into the
19 record at a public hearing or the statement of the Judiciary
20 Committee at a public hearing, that would be the -- a record of a
21 public office or agency. The individual statement of Representative
22 Conyers at a hearing is not necessarily the statement of the public

1 office or of the commission or of the committee, which was -- which
2 is how it would be admitted under 803(8).

3 MJ: What is the government's position on say I rule it's not
4 admissible under 803(8) but it's admissible for the non-hearsay
5 purpose that Congress is holding hearings on these issues and is
6 talking about them?

7 ATC[CPT MORROW]: And that would be relevant to sentencing? Now
8 I'm asking you the questions, but I'm ----

9 MJ: Well the idea -- I guess the, just say, the theory could
10 be that Congress is having hearings with members voicing Mr. Conyers'
11 statements here about the First Amendment and this could be relevant
12 to the sentencing authority on not necessarily damage but the --
13 yeah, damage, whether this is good or bad for national security.

14 ATC[CPT MORROW]: If articulated in that way, ma'am, then
15 potentially that would be relevant for a non-truth purpose.

16 MJ: Okay. And what's the government's position if the rules
17 are relaxed?

18 ATC[CPT MORROW]: If the rules are relaxed and the court
19 considers the statement relevant for its truth, then, yes, it would
20 be admissible. If the rules are relaxed, it's admissible for its
21 truth, assuming the court finds the statement relevant to the
22 sentencing portion.

1 MJ: So it's the government's position for -- if the rules are
2 relaxed, they talk about hearsay and authenticity; they don't talk
3 about relevance.

4 ATC[CPT MORROW]: Yes, ma'am, so the -- if the rules are
5 relaxed, the government has no concerns with the reliability of the
6 statement from Representative Conyers; and, yes, it is still hearsay
7 but that -- the government's understanding is that hearsay can be
8 relaxed provided that it's backed up by sources that are reliable.

9 MJ: Okay, thank you.

10 ATC[CPT MORROW]: Yes, ma'am.

11 MJ: Defense?

12 ADC[CPT TOOMAN]: Your Honor, it's the defense's position that
13 these -- each of these statements is very clearly relevant on
14 sentencing. R.C.M. 1001(c)(1)(B) talks about matters that mitigate
15 an offense to lessen punishment. It's the defense's position that
16 each one of these statements clearly falls within that language ----

17 MJ: How?

18 ADC[CPT TOOMAN]: ---- of 1001. Would you like me to go ----

19 MJ: Uh-huh [**affirmative response**].

20 ADC[CPT TOOMAN]: Okay. Okay, Attachment A, the defense's
21 position would be if the detainee assessment briefs don't reveal
22 anything about current assessments, then there's not damage; and if
23 there's not damage, that's mitigating.

1 MJ: Okay, now that's assuming -- that's relevance if I admit
2 it for the truth of the matter asserted. If I admit it for the fact
3 that it was said, how is it relevant?

4 ADC[CPT TOOMAN]: I think the response can be the same for each
5 of these things. If it's stated by the government, then that's
6 relevant because it shows the government took that position at one
7 time and saw fit to state that position publicly; and if that's the
8 case, then that mitigates any potential punishment for PFC Manning.

9 MJ: Okay.

10 ADC[CPT TOOMAN]: Looking at Attachment B, which are the
11 statements by the President, the fact that these documents I'm
12 quoting here, the fact that these documents don't reveal any issues
13 that haven't already informed our public debate, that suggests that
14 this stuff is already out there; the people are already considering
15 it and they're talking about it when they're discussing the war in
16 Afghanistan; and if it's out there and people are discussing it, then
17 there can't be a lot of damage; and if there's not a lot of damage,
18 then that mitigates -- would mitigate PFC Manning's punishment.

19 MJ: Okay.

20 ADC[CPT TOOMAN]: Secretary Gates, the review to date has not
21 revealed any sensitive intelligence sources and methods compromised
22 by this disclosure; very clearly mitigating. If things aren't
23 compromised, then there's not damage.

1 MJ: You're on Attachment C now?

2 ADC[CPT TOOMAN]: Yes; yes, ma'am.

3 MJ: Okay.

4 Attachment D?

5 ADC[CPT TOOMAN]: Okay, D, again, you know, you've got Secretary
6 Gates talking about how this isn't the end of the world; this kind of
7 game-changing meltdown that has been described isn't the case, and so
8 that would tend to mean that there's not damage or there's less
9 damage than what was previously stated by the government; that would
10 mitigate punishment. He talks about how this isn't going to affect
11 diplomacy. People work with us because they have to work with us not
12 because they want to work with us or they like us; and so if there's
13 no effect on diplomacy, that would mitigate PFC Manning's punishment.

14 MJ: Okay.

15 E?

16 ADC[CPT TOOMAN]: Again, you've got Secretary Clinton here this
17 time talking about diplomacy. Things are going to go on. This isn't
18 going to affect the way we do business. If there's no effect on the
19 way we conduct our affairs internationally, then that means there's
20 not that much damage; that would mitigate punishment.

21 MJ: Okay.

22 ADC[CPT TOOMAN]: For F, you've got Secretary Clinton, again,
23 talking about how, hey, all this shows is the way our diplomats do

1 work. In a lot of cases this may even be good because it shows that
2 the things we're saying publicly are the things that we're reporting
3 back and that sort of thing, and so there are even some positive
4 impact potentially; very clearly mitigating.

5 MJ: Okay.

6 ADC[CPT TOOMAN]: With Vice President Biden, point blank says,
7 "I don't think there's any damage," in relation to the disclosures on
8 WikiLeaks, obviously mitigating.

9 And, finally, Representative Conyers representing ----

10 MJ: How is he -- how is his opinion relevant?

11 ADC[CPT TOOMAN]: His opinion's relevant, Your Honor, because
12 he's a part of the government and he's talking about how things are
13 classified and how there's potential positive impact from this, where
14 he's saying, hey, in the past we've had disclosures and that ended up
15 being a good thing, so that would be mitigating, acknowledging that
16 this is possibly a good thing and also talking about the way things
17 are classified and how we need to have high fences around a little
18 material rather than broad fences, you know, wide fences around
19 everything.

20 MJ: So what's the difference between introducing this and
21 bringing everybody in the country who thinks that in to testify? I
22 mean, what's -- people's personal opinions about classification, what
23 difference does it make?

1 ADC[CPT TOOMAN]: Well his opinion is more on point because he's
2 certainly closer; has much more involvement in it; sees it from a
3 perspective that other people don't. He's a representative in the
4 House and so he has a perspective that many people can't offer.
5 There are only so many people who can offer that perspective.

6 MJ: Okay.

7 ADC[CPT TOOMAN]: Your Honor, in regards to the government's
8 assertions that 803(8), some of these things don't record the
9 activity of government agencies, it just doesn't make sense. Part of
10 the function of the Department of Defense and the Department of State
11 is to make public statements; to give briefings; to talk to the
12 press; that is an activity of the Department of Defense; that is an
13 activity of the Department of State. When that's memorialized in a
14 transcript and released, that is a report of the activity of the
15 Department of Defense and a report of the activity of the Department
16 of State, and so those things clearly memorialize activity of those
17 offices and those agencies.

18 Now the government also talked about in relation to 807
19 there being more probative evidence than the opinions or the
20 statements of the Department of -- or the Secretary of Defense and
21 the Secretary of State. If there is more -- if there's a more
22 valuable opinion, we would look forward to receiving that as a Brady
23 disclosure because we haven't found it. Certainly, ----

1 MJ: Well I think the -- it was the matter you brought up before
2 that they -- it's their testimony that would be more valuable than
3 that snippet.

4 ADC[CPT TOOMAN]: Certainly, Your Honor. The defense would
5 agree that that -- if the defense misunderstood the government's
6 position on that, we would certainly agree with what Your Honor just
7 indicated that live testimony would, of course, be better, clearly,
8 but the government seemed to suggest that there is more probative
9 evidence than the Secretary of State saying this isn't a game
10 changer; this is just showing what we do. We don't think there is
11 more probative evidence, and if there is, like I mentioned, we would
12 look forward, if they have knowledge of that, receiving that because
13 certainly my opinion, you know, as a defense counsel, if I tell
14 someone something, that carries some weight, but if my SDC says
15 something, that carries more weight; my RDC carries more weight; the
16 chief of TDS carries more weight. There's no one really above the
17 Secretary of State, except for the President, and so we look forward
18 to anything that would be more probative than the Secretary of State
19 or the Secretary of Defense; clearly very useful statements, in the
20 defense's opinion.

21 Subject to your questions, ma'am.

22 MJ: Okay, I think I asked them; thank you.

23 ADC[CPT TOOMAN]: Thanks.

1 MJ: All right, I'm looking at the time. It's almost 1330,
2 and I know we haven't gone for lunch yet.

3 PFC Manning, I apologize for that. Normally, I wouldn't
4 keep us that long. I haven't looked at the clock. I've been riveted
5 by the counsel's argument.

6 ACC: Yes, Your Honor.

7 MJ: Is there anything else we need to address before we
8 recess the court?

9 CDC[MR. COOMBS]: No, Your Honor.

10 TC[MAJ FEIN]: No, Your Honor.

11 MJ: All right, and once again we're starting at 1300
12 tomorrow.

13 Court is in recess.

14 **[The Article 39(a) session recessed at 1324, 17 October 2012.]**

15 **[END OF PAGE]**

Pages 2120 through 2160 of this transcript are classified “SECRET”. This session (17 October 2012, Session 1) is sealed for Reasons 2, 3, and 4, Military Judge’s Seal Order dated 17 January 2014 and stored in the classified supplement to the Record of Trial.

1 [The Article 39(a) session was called to order at 1310, 18 October
2 2012.]

3 MJ: This Article 39(a) session is called to order. Let the
4 record reflect all parties present when the court last recessed are
5 again present in court or am I mistaken, Major Fein?

6 TC[MAJ FEIN]: Your Honor, Staff Sergeant Chavez is absent; SSG
7 Foy is present as the court reporter.

8 MJ: All right, thank you.

9 All right, today we have the litigation regarding the
10 defense motion to compel witnesses for the speedy trial litigation
11 that we currently had scheduled at the next Article 39(a) session,
12 which is at the end of October through November 2nd. It will be the
13 29th of October through November 2nd; and prior to doing that, the
14 court is prepared to rule on the government's *in camera* and *ex parte*
15 motions for authorizations for redactions and substitutions of FBI
16 and Department of State records.

17 The court met for an *ex parte*, *in camera* session with the
18 government on two occasions regarding the FBI records and one
19 occasion regarding the Department of State records to discuss court
20 -- the court's concerns and to require some additional disclosures to
21 the defense.

22 The government has submitted an *ex parte* notice to me;
23 has that been marked as an appellate exhibit, Major Fein?

1 TC[MAJ FEIN]: Yes, Your Honor. It's been marked as Appellate
2 Exhibit 353.

3 MJ: All right, and based on those *ex parte*, *in camera* Article
4 39(a) sessions as well as the appellate exhibit that's been filed *ex*
5 *parte*, the court is prepared to rule as follows:

6 On 14 September 2012, the government moved *ex parte* under
7 Military Rule of Evidence 505(g)(2) and Rule for Court-Martial
8 701(g)(2) for the court to conduct an *in camera* review of an
9 authorized limited disclosure in the form of redactions for
10 Department of State and Federal Bureau of Investigation records. The
11 defense opposed redaction. The court reviewed the government's
12 unclassified and classified motions for redactions to Department of
13 State and FBI records and conducted an *in camera* review of the
14 original documents and the proposed redactions. In coming to this
15 ruling, the court has considered the factors requested by the defense
16 in paragraph 7 of its 19 September 2012 response.

17 The court finds and rules as follows:

18 Department of State Records: On 28 September, the court
19 granted the government's motion for M.R.E. 505(g)(2) substitution by
20 redaction for the, quote, unquote, Bucket 3 records. The court
21 granted the government's motion for M.R.E. 505(g)(2) substitution by
22 redaction for the Bucket 2 records in part finding that the vast
23 majority of the proposed redactions by -- of the Department of

1 Defense documents in Bucket 2 were personally identified information,
2 PII, of individuals in the persons at risk group and were properly
3 redacted in accordance with the court's 19 July 2012 ruling, Defense
4 Motion to Compel DoS Discovery - Motion to Compel 2. The court
5 identified one potential categorical exception and held an *ex parte*,
6 *in camera* classified Article 39(a) session with the government on the
7 2nd of October, 2012, to address the potential categorical exception.
8 A court reporter transcribed the classified proceedings.

9 On 17 October 2012, the government advised the court that
10 the redacted information the court required for release to the
11 defense was no longer redacted and was available for disclosure to
12 the defense.

13 The government motion for M.R.E. 505(g)(2) substitution
14 by redaction is granted.

15 FBI Records: After conducting an *in camera* review of the
16 FBI records, the court held an *ex parte*, *in camera* classified Article
17 39(a) session with the government on the 12th of October, 2012, to
18 address several concerns of the court with respect to some of the
19 records proposed for redaction. The Article 39(a) session was
20 transcribed by a court reporter and the court's concerns are on the
21 record.

22 On 17 October 2012, in Appellate Exhibit 349, the
23 government disclosed one portion of the FBI file that the govern --

1 that the court ordered disclosed to the defense. The court held a
2 second *ex parte*, *in camera* classified Article 39(a) session with the
3 government on the 17th of October, 2012, to address the remaining
4 concerns of the court. That Article 39(a) session was also
5 transcribed by a court reporter. All of the remaining concerns
6 raised by the court have been addressed by the government.

7 The government motion for M.R.E. 505(g) substitution by
8 redaction is granted. The information redacted is not relevant to
9 the accused or to the charged offenses or constitutes attorney or
10 other government work product or administrative information. The
11 redacted Department of State and FBI records meet the government's
12 discovery obligations under Brady and R.C.M. 701(a)(6) to disclose
13 evidence tending to negate the guilt of the accused to an offense
14 charged or reduce the degree of guilt to an offense charged or to
15 reduce the punishment. The redacted information in the DoS and FBI
16 substitutions is not material to the preparation of the defense to
17 the extent necessary for production for discovery under Rule for
18 Court-Martial 703(f). The classified information in the redactions
19 is not necessary to enable the accused to prepare for trial. No
20 redacted information in the Department of State or FBI records that
21 has not been disclosed to the defense will be used by the government
22 or any government witness during any portion of the trial, to include
23 rebuttal and rule of completeness. The substitution of the DoS

1 Bucket -- Department of State Bucket 2 records and the FBI records is
2 sufficient for the defense to adequately prepare for trial and
3 represents an appropriate balance between the right of the defense to
4 discovery of relevant and necessary classified information and the
5 protection of specific national security information, particularly
6 intelligence sources and methods, and for the Department of State
7 records, the safety of individuals identified by Department of State
8 as persons at risk.

9 Ruling: The motions by the government to voluntarily
10 provide limited disclosure under M.R.E. 505(g)(2) for Department of
11 State and FBI records is granted. I've had this ruling marked as the
12 next appellate exhibit in line, which would be Appellate Exhibit 355.

13 The court is also prepared to rule on the defense motion,
14 Motion for Judicial Notice of Adjudicative Facts, Finkel Book, and
15 Public Statements.

16 Finkel Book: On 3 August 2012, the defense moved the
17 court to take judicial notice of David Finkel's book, *The Good*
18 *Soldiers*; that it was published before publication of the video at
19 issue in Specification 2 of Charge II; and that the book contains
20 audio from the video. The government did not oppose the court taking
21 judicial notice that the book was published before publication of the
22 video but did object to the court taking judicial notice that the
23 book contains a verbatim transcript of the video. The defense

1 provided the court with a *Washington Post* article, dated 6 April
2 2010, by David Finkel, describing an excerpt from his book but did
3 not provide the excerpt from Mr. Finkel's book.

4 2. On 30 August 2012, the court ruled in Appellate
5 Exhibit 288 that the court would take judicial notice of Mr. Finkel's
6 book and relevant excerpts from the passage of the book if the
7 defense provided the court with the necessary information. The court
8 denied the defense motion to take judicial notice that the book
9 contains a verbatim transcript of the audio from the video charged in
10 Specification 2 of Charge II as linkage argument and legal
11 conclusions regarding the contents of Mr. Finkel's book and the audio
12 in the video are properly presented to the fact finder by the
13 parties, not the court.

14 3. The defense has provided the court with the video and
15 the relevant excerpts from Mr. Finkel's book. The court has compared
16 the excerpts with the video. Defense now moves the court to take
17 judicial notice of Mr. Finkel's book, the date of publication, the
18 provided excerpts, and that the book quotes the video verbatim at
19 several key points.

20 4. The court adheres to its 30 August 2012 ruling. The
21 court will take judicial notice of Mr. Finkel's book, the date of
22 publication, and the provided excerpts. Comparison between Mr.
23 Finkel's book and conclusions to be drawn from the comparisons are

1 properly presented to the fact finder by the parties, not by the
2 court. The request to take judicial notice that the book quotes the
3 video verbatim at several key points is denied.

4 Statements by Public Officials: On 3 August 2012, the
5 court moved -- the defense moved the court to take judicial notice of
6 statements made by public officials and proffered the adjudicative
7 facts judicially noticed would be relevant for sentencing. The
8 government opposed.

9 2. In their initial motion, the defense proffered that
10 the statements of public officials that the defense seeks to have
11 judicially noticed as adjudicative facts are admissible as admissions
12 by a party-opponent under Military Rule of Evidence 801(d)(2)(B) and
13 (D). The government opposed admission and judicial notice.

14 3. On 30 August 2012, the defense supplied the court
15 with additional case law in support of their argument and additional
16 bases for admission of the evidence to be judicially noticed. The
17 court ordered supplemental briefs to be filed by the parties
18 regarding the following issues:

19 A. Admissibility under M.R.E. 801(d)(2)(B) and (D)
20 addressing the new case law provided by the defense whether a
21 statement by a congressman is admissible.

22 B. The applicability of M.R.E. 805, hearsay within
23 hearsay.

1 C. Whether the requested evidence is admissible as
2 residual hearsay under M.R.E. 807.

3 D. Whether each proposed statement offered for admission
4 is offered for the truth of the matter asserted.

5 E. Admissibility of newspaper articles as business
6 records.

7 F. Whether there is any case law regarding taking
8 judicial notice of newspaper articles.

9 G. The parties' position regarding admissibility of the
10 proposed public statements for sentencing when the rules have not
11 been relaxed and when the rules for sentencing have been relaxed in
12 accordance with Rule for Court-Martial 1001(c)(3).

13 Also on 30 August, the defense presented the court with a
14 28 July 2010 letter from Senator Carl Levin to Secretary of Defense
15 Robert Gates; a 16 August 2010 response by Secretary Gates; and the
16 portion of the congressional record of the 16 December 2010 hearing
17 before the Committee on the Judiciary House of Representatives on
18 Espionage Act and the legal and constitutional issues raised by
19 WikiLeaks that contained the opening statement by Congressman John
20 Conyers, Jr.

21 4. On 13 September 2012, the defense filed a
22 supplemental brief. In it the defense provided a 24 April 2011
23 statement by Pentagon Secretary Geoff Morrell and Special Envoy for

1 closure of the Guantanamo Detention Facility, Ambassador Daniel
2 Fried, issued as news release on the Web provided by the Department
3 of Defense. The defense requested the court take judicial notice of
4 this statement in lieu of the 24 April 2011 *New York Times* article.
5 Similarly, the defense presented the court with a 27 July 2010
6 statement of President Barack Obama issued by the White House Office
7 of Press Secretary. Defense moves the court to take judicial notice
8 of this statement in lieu of the 27 July 2010 BBC news article. The
9 defense further moves this court to take judicial notice of Senator
10 Levin's 28 July 2010 letter and Mr. Gates's response in lieu of the
11 15 October 2010 Associated Press and MSNBC articles; and to take
12 judicial notice of the 30 November 2010 Defense.gov news transcript
13 of a DoD briefing with Secretary Gates in lieu of the 30 November
14 2010 *New York Times* article.

15 Finally, the defense moves the court to take judicial
16 notice of Secretary of State Hillary Clinton's 1 December 2010,
17 quote, Remarks with Kazakh Foreign Minister Saudabayev after their
18 meeting, unquote, released on the Department of State Web site in
19 addition to Secretary Clinton's comments reported in the 1 December
20 2010 *USA TODAY* article entitled, quote, Clinton: WikiLeaks won't
21 hurt U.S. diplomacy, unquote; the 4 December 2010 CNN article, quote,
22 Clinton: WikiLeaks cables show diplomacy at work, unquote; 4
23 December 2010 *New York Times* article, quote, From WikiLeaks, Clinton

1 Tries to Make Lemonade, unquote; and 4 December 2010 UPI article,
2 quote, Clinton on leaked documents: So what, unquote. The
3 government opposes but stipulates that the statements at issue were
4 made and stipulates to the admissibility of the portion of the
5 statements made by Pentagon Press Secretary Morrell and Special Envoy
6 for closure of Guantanamo Detention Facility, Ambassador Daniel
7 Fried; President Obama; and Defense Secretary Gates in his 16 August
8 2010 letter; that the government further concedes that if the rules
9 for sentencing are relaxed under R.C.M. 1001(c)(3), then all of the
10 statements except those of Secretary Hillary Rodham Clinton would be
11 admissible.

12 The statements at issue were as follows:

13 A. Geoff Morrell, Press Sec -- Pentagon Press Secretary,
14 quote, It is unfortunate that the *New York Times* and other news
15 articles -- organizations have made the decision to publish numerous
16 documents obtained illegally by WikiLeaks concerning the Guantanamo
17 Detention Facility. The documents contain classified information
18 about current and former Guantanamo detainees and we strongly condemn
19 the leaking of this sensitive information. The WikiLeaks releases
20 include detainee assessment briefs, DABs, written by the Department
21 of Defense between 2002 and 2009. These DABs were written based on a
22 range of information available then. The Guantanamo Review Task
23 Force established in January 2009 considered the DABs during its

1 review of detainee information. In some cases the Task Force came to
2 the conclusions -- same conclusions as the DABs. In other instances,
3 the Review Task Force came to different conclusions based on updated
4 or other available information. The assessments of the Guantanamo
5 Review Task Force have not been compromised to WikiLeaks, thus any
6 given DAB illegally obtained and released by WikiLeaks may or may not
7 represent the current view of a given detainee.

8 Both the previous and current administrations have made
9 every effort to act with the utmost care and diligence in
10 transferring detainees from Guantanamo. The previous administration
11 transferred 537 detainees. To date, the current administration has
12 transferred 67. Both administrations have made the protection of
13 American citizens the top priority and we are concerned that the
14 disclosure of these documents could be damaging to these efforts.
15 That said, we'll continue to work with allies and partners around the
16 world to mitigate threats to the U.S. and other countries and to work
17 towards the ultimate closure of the Guantanamo Detention Facility
18 consistent with good security practices and our values as a nation.

19 B. President Barack Obama statement: While I'm
20 concerned about the disclosure of sensitive information from the
21 battlefield that could potentially jeopardize individuals or
22 operations, the fact is those doc -- these documents don't reveal any
23 issues that have not already informed our public debate on

1 Afghanistan. Indeed, they point to the same challenges that led me
2 to conduct an extensive review of the policy last fall -- our policy
3 last fall.

4 C. Statement by Defense Secretary Robert Gates, 16
5 August 2010 letter to Senator Levin: Thank you for your July 28,
6 2010, letter regarding the unauthorized disclosure and publication of
7 classified military documents by WikiLeaks organization. I share
8 your concerns about the potential compromise of classified
9 information and its effect on the safety of our troops, allies, and
10 Afghan partners. After consulting with the Director of the Federal
11 Bureau of Investigation, I have directed a thorough investigation to
12 determine the scope of any unauthorized release of classified
13 information and identify the person or persons responsible. I've
14 also established an Interagency Review Task Force -- Information
15 Review Task Force, led by the Defense Intelligence Agency, to assess
16 the content of any compromised information and the impact of such
17 compromise. Our initial review indicates that most of the
18 information contained in these documents relates to tactical military
19 operations. The initial assessment in no way discounts the risk to
20 national security; however, the review to date has not revealed any
21 sensitive intelligence sources or methods compromised by the
22 disclosure. The documents do not contain the names of cooperative
23 Afghan Nationals and the Department takes very seriously the Taliban

1 threats recently discussed in the press. We assess this risk as
2 likely to cause significant harm or damage to the national security
3 interests of the United States and are examining mitigation options.
4 We are working closely with our allies to determine what risks our
5 mission partners may face as a result of the disclosure.

6 There is a possibility that additional military documents
7 may be published by WikiLeaks and the Department is developing
8 courses of action to address this possibility. The scope of the
9 assessment and the nature of the investigative process require a
10 great deal of time and effort. I am committed to investigating this
11 matter and determining appropriate action to reduce the risk of such
12 compromises in the future.

13 Second statement, D, of Defense Secretary Robert Gates:
14 DoD news transcript, 30 November 2010, quote, Let me just offer some
15 perspective as somebody who has been at this a long time. Every
16 other government in the world knows the United States Government
17 leaks like a sieve and has for a long time, and I dragged this up the
18 other day when I was looking at some of these prospective releases.
19 And this is a quote from John Adams: How can a government go on,
20 publishing all of their negotiations with foreign nations, I know
21 not.

22 To me, it appears as dangerous and pernicious as it is
23 novel. Now, I've heard the impact of these releases on our foreign

1 policy described as a meltdown, as a game changer, and so on. I
2 think those descriptions are fairly significantly overwrought. The
3 fact is, governments deal with the United States because they believe
4 we can keep secrets. Many respect us because they need us. We are
5 still essentially, as has been said before, the indispensable nation.

6 So other nations continue -- will continue to deal with
7 us. They will continue to work with us. We will continue to share
8 sensitive information with one another. Is this embarrassing? Yes.
9 Is it awkward? Yes. Consequences for U.S. policy are, I think,
10 fairly modest.

11 E. Secretary of State Hillary Rodham Clinton, DoS Press
12 Release 1 December 2010, quote, Remarks with Kazakh Foreign Minister
13 Saudabayev after their meeting; quote, I have certainly raised the
14 issue of leaks in order to assure our colleagues that it will not in
15 any way interfere with American diplomacy or our commitment to
16 continuing important work that is ongoing. I have not had any
17 concerns expressed about whether any nation will not continue to work
18 with and discuss matters of importance to both of us going forward.

19 As I said, I am proud of the work that American diplomats
20 do and the role that America plays in the world. Both President
21 Obama and I are committed to a robust and comprehensive agenda of
22 engagement and I am confident that the work our diplomats do every
23 day -- every single day will go forward. I anticipate there will be

1 a lot of questions that people have every right and reason to ask and
2 we stand ready to discuss them at any time with our counterparts
3 around the world.

4 F. Secretary of State Hillary Rodham Clinton, CNN
5 politics, 4 December 2010, quote, Clinton: WikiLeaks cables show
6 diplomacy at work; 4 December 2010, *New York Times* article, quote,
7 From WikiLemons, Clinton Tries to Make Lemonade, unquote; and 4
8 December 2010, UPI article, quote, Clinton on leaked documents: So
9 what, unquote. The confidential U.S. Embassy cables posted online by
10 the Web site WikiLeaks simply show, quote, Diplomats doing the work
11 of diplomacy. Everybody is concerned. Everybody has a right to have
12 us talk to them and have any questions that they have answered, but
13 at the end of the day, as a couple of analysts and writers are now
14 writing, what you see are diplomats doing the work of diplomacy but I
15 haven't seen anybody in the world and apparently there's -- I haven't
16 seen everybody in the world. Apparently, there's 252,000 of these
17 things out there in cyberspace somewhere so I think I'll have some
18 outreach to continue doing over the next weeks just to make sure as
19 things become public if they raise concerns I will be prepared to
20 reach out and talk to my counterparts or heads of state government.
21 In a way it should be reassuring despite the occasional tidbit that's
22 pulled out and unfortunately blown up. The work of diplomacy is on
23 display and as you know it is not our intention for it to be released

1 this way. Usually it takes years before such matters are, but I
2 think there's a lot to be said about what it shows about foreign
3 policy of the United States, unquote.

4 G. Vice President Joseph Biden, MSNBC, undated,
5 transcript of interview with Andrea Mitchell, quote, I came in;
6 almost all of it was -- embraces -- I mean, it wasn't just shaking
7 hands. I know. I know these guys. I know these women. They still
8 trust the United States. There are all kinds of things, and in
9 response to a question, quote, so there's no damage, unquote. I
10 don't think there's any damage. I don't think there's any
11 substantive damage. No. Look, some of the cables that are coming
12 out here and around the world are embarrassing. I mean, you know, to
13 say that, you know, for you now to do a cable as an ambassador and
14 say, I don't like Biden's tie. He don't -- he doesn't look good and
15 he's a homely guy, that's not something and it has in brackets I
16 never said that. No. I know you didn't but yet, I mean, you know,
17 so there's a lot of things like that that you would allow another
18 nation to say they lied to me; we don't trust them. They really are
19 not dealing fairly with us, unquote.

20 H. The Honorable John Conyers, Jr., Hearing on Espionage
21 Act and the Legal and Constitutional Issues Raised by WikiLeaks, 16
22 December 2010, quote, We are too quick to accept government claims of
23 risk to national security and far too quick to forget the enormous

1 value of some national security leaks and quoting Secretary Gates, I
2 have heard the impact of these releases on our foreign policy
3 described as a meltdown, as a game changer, and so on. I think those
4 descriptions are fairly significantly overwrought, unquote.

5 3. On 29 August 2012, during oral argument, the defense
6 withdrew its request for judicial notice of public comments from
7 Marine Colonel David Lapan.

8 4. On 30 August 2012, during oral argument, the defense
9 provided the court with a copy of the 16 August 2010 letter from
10 Defense Secretary Robert Gates to Carl Levin, Chairman, Senate
11 Committee on the Armed Services. The letter provided the source for
12 Mr. Gates's statement quoted in the 15 October 2010 Associated Press
13 article described above. In place of that letter -- excuse me, in
14 place of that article the defense requests the court take judicial
15 notice of Mr. Gates's 16 August 2010 letter and the 28 July 2010
16 letter from Senator Levin requesting Mr. Gates's response.

17 The Law: Judicial Notice.

18 1. Military Rule of Evidence 201 governs judicial notice
19 of adjudicative facts. The judicially noticed fact must be one not
20 subject to reasonable dispute in that it is either (1) generally
21 known universally, locally, or in the area pertinent to the event; or
22 (2) capable of accurate and ready determination by resources --
23 resort to resources -- to sources whose accuracy cannot be reasonably

1 questioned. *U.S. v. Needham*, 23 M.J. 383, Court of Military Appeals
2 1987; *United States v. Brown*, 33 M.J. 706, Army Court of Military
3 Review 1991.

4 2. Military Rule of Evidence 201(c) requires the
5 military judge to take judicial notice of adjudicative facts if
6 requested by a party and supplied with the necessary information.

7 3. When the military judge takes judicial notice of
8 adjudicative facts, the fact finder is instructed that they may, but
9 are not required to, accept as conclusive any matter judicially
10 noticed.

11 4. Judicial notice is of adjudicative facts. Judicial
12 notice is not appropriate for inferences a party hopes the fact
13 finder will draw from the facts judicially noticed. Legal arguments
14 and conclusions are not adjudicative facts subject to judicial
15 notice. *United States v. Anderson*, 22 M.J. 885, Air Force Court of
16 Military Review 1985, where the court said it's appropriate to take
17 judicial notice of the existence of a treatment program at a
18 confinement facility but not appropriate to take judicial notice of
19 the quality of the program.

20 The Law: Hearsay.

21 1. Hearsay is a statement other than one made by the
22 declarant while testifying at trial, offered in evidence to prove the
23 truth of the matter asserted. Military Rule of Evidence 801(c).

1 Hearsay is not admissible except as provided by the Military Rules of
2 Evidence or by any act of Congress applicable to trials by court-
3 martial. M.R.E. 802.

4 2. Admission by a party-opponent. M.R.E. 801(d) (2)
5 provides in relevant part that admissions by a party-opponent are not
6 hearsay if the statement is offered against a party and is:

7 (a) the party's own statement in either the party's
8 individual or representative capacity;

9 (b) a statement by which the party has manifested the
10 party's adoption or belief into the truth;

11 (c) a statement by the party's agent or servant
12 concerning a matter within the scope of the agency or employment of
13 the agent or servant made during the existence of the relationship.
14 The contents of the statement shall be considered but are not alone
15 sufficient to establish the declarant's authority under (c) or the
16 agency or employment relationship and the scope thereof under (d).

17 Relevant Hearsay Exceptions:

18 A. M.R.E. 803(6), records of regularly conducted
19 activity; Military Rule of Evidence 803(8), public records and
20 reports; Military Rule of Evidence 807, residual hearsay; or, M.R.E.
21 805 provides that hearsay included within hearsay is not excluded
22 under the hearsay rule if each part of the combined statement

1 conforms with an exception to the hearsay rule provided under these
2 rules.

3 The Law: Sentencing Relaxed Rules.

4 1. R.C.M. 1001(c)(3) authorizes the military judge with
5 respect to matters in extenuation or mitigation or both to relax the
6 rules of evidence. This may include admitting letters, affidavits,
7 certificates of military and civil officers, and other writings as
8 similar authenticity and reliability.

9 2. R.C.M. 1001(c)(4) provides that when the rules of
10 evidence have been relaxed for the defense, they may be relaxed
11 during rebuttal and surrebuttal to the same degree.

12 Conclusions of Law:

13 The statements proffered by the defense in Enclosures A
14 through H of the 13 September 2012 defense supplement are not
15 relevant to the merits portion of the trial. The conclusions of law
16 below address admissibility during the sentencing portion of the
17 trial. Admissibility is admissions by a party-opponent under M.R.E.
18 801(d)(2)(B) or M.R.E. 801(d)(2)(D):

19 1. There's no direct military case law regarding whether
20 statements by government agents can be admissible against a party-
21 opponent in a criminal proceeding. The federal circuits have varied
22 opinions on this issue. See *United States v. Bellamy*, 403 Maryland
23 308 at 322, 325, Court of Appeals Maryland 2008. The court agrees it

1 is possible for statements by executive branch officials to be
2 admitted in a criminal proceeding as admissions by a party-opponent.
3 See *United States v. Van Griffin*, 874 F.2d 634 at 638, 9th Circuit
4 1989, holding that a manual on a field sobriety test issued by the
5 government should be admissible as an admission of a party-opponent
6 during a drunk driving case. *United States v. Barile*, 286 F.3d at
7 749, 758, 4th Circuit 2002, holding that in a prosecution for making
8 false statements to the FDA, the statements of an employee of the FDA
9 could be admitted against the government pending proper foundation.
10 *United States v. Warren*, 42 F.3d 647 at 655, D.C. Circuit 1994,
11 holding that the government had manifest itself its belief in sworn
12 statements by a police officer contained in an affidavit; therefore,
13 the statements were admissible under Federal Rule of Evidence
14 801(d)(2)(B). The court further agrees with the government that the
15 cases allowing such admissions are those where the prosecution has
16 manifested its belief in the truth of a statement in a court
17 proceeding or a judicial document that should be admissible when the
18 government takes a contrary position. *United States v. Branham*, 97
19 F.3d 385 at 851, 6th Circuit 1991; *United States v. Morgan*, 581 F.3d
20 933 at 937, D.C. Circuit 1978.

21 2. The court adopts the three-part test adopted by the
22 Second Circuit in *United States v. Salerno*, 937 F.2d 797 at 811, 2d
23 Circuit 1991, to determine if the statements at issue are admissible

1 against the government and worthy of judicial notice. The three-part
2 test requires the court to be satisfied that the prior statement
3 involves an assertion of fact inconsistent with similar assertions in
4 the subsequent trial.

5 2. The court must determine if the statements were such
6 as to be the equivalent of testimonial statements. Last, the
7 District Court must determine by a preponderance of the evidence that
8 the inference that the proponent of the statement wishes to draw is a
9 fair one and that an innocent explanation for the inconsistency does
10 not exist. *Salerno*, 937 F.2d at 811, 2d Circuit 1991, quoting *United*
11 *States v. McKeon*, 738 F.2d 26 at 33, 2d Circuit 1984, quotations
12 omitted, and also *United States v. DeLoach*, 34 F.3d 1001, 1005, 11th
13 Circuit 1994, adopting the test from *Salerno*.

14 3. To qualify as admission as a statement against a
15 party-opponent, the statement must bear such a close resemblance to
16 in-court testimony that they may be considered its functional
17 equivalent. As the court noted in *McKeon*, while analyzing whether
18 the use of prior opening statements were admissible against the
19 government in subsequent trials, quote, speculation of counsel,
20 advocacy as to the credibility of witnesses, arguments as to the
21 weakness in a prosecution case, or invitations to a jury to draw
22 certain inferences should not be admitted. The inconsistency
23 moreover should be clear and of a quality that obviates any need for

1 the trier of fact to explore other events at the prior trial. The
2 court must further determine that the statements of counsel were such
3 to be the equivalent of testimonial statements by the defendant.
4 Some participatory role of the client must be evident, either
5 directly or inferentially, as when the argument is a direct assertion
6 of fact which in all probability had to be confirmed by the
7 defendant. *McKeon* at 33.

8 4. Casual statements made to private individuals with no
9 expectation of conveyance beyond a listener are not testimonial even
10 if highly incriminating of another. *United States v. Scheurer*, 62
11 M.J. 100 at 105, Court of Appeals for the Armed Forces, quoting
12 Robert P. Mosteller, *Crawford v. Washington: Encouraging and*
13 *Ensuring the Confrontation of Witnesses*, 39 University of Richmond
14 Law Review at 511, 540 (2005). Testimonial statements bear indicia
15 of reliability often, quote, contained in formalized material, such
16 as affidavits, depositions, prior testimony, or confessions, unquote.
17 *United States v. Hendricks*, 395 F.3d 173 at 181, 3d Circuit 2005,
18 quoting *Crawford v. Washington*, 541 U.S. 36 at 52 (2004). Statements
19 cannot be deemed testimonial if the declarant did not make the
20 testimony thinking they would be available for use at trial later on.
21 *U.S. v. Scheurer* at 105, quoting *Crawford* 541 U.S. at 52.

22 5. To determine whether a statement is testimonial and
23 non -- or nontestimonial, it is relevant to inquire was the statement

1 at issue in response to a law enforcement or prosecutorial inquiry;
2 is the statement a direct assertion of fact; what was the primary
3 purpose of making the statement. *United States v. Rankin*, 64 M.J.
4 438 [sic] at 352, Court of Appeals for the Armed Forces; *McKeon* at
5 33.

6 6. The fact that a statement is admissible against a
7 party-opponent does not bind the party to the statement. The party
8 against whom such a statement is made can rebut the statement and
9 assert a different or contrary position. *Bellamy* 403 Maryland at
10 328, Footnote 19.

11 7. There are eight statements of public officials
12 currently at issue.

13 A. The statement by Geoff Morrell, Pentagon Press
14 Secretary, is admissible under Military Rule of Evidence
15 801(d)(2)(D). The substance of the statement, specifically the
16 assessment of the Guantanamo Review Task Force, has not been
17 compromised to WikiLeaks is an assertion of fact and likely one
18 inconsistent with the position taken by the government at trial.
19 This statement was delivered by a Pentagon press secretary and
20 distributed to the media for widespread publication, was done under
21 normal circumstances, and is bereft of personal opinion. The primary
22 purpose of the statement was to convey information to the public,
23 unlike statements made to a family or friend, and this direct

1 assertion of fact in all probability had to be confirmed by the
2 government. The statement is, therefore, viewed with the hallmark --
3 with the reliability that's the hallmark of the testimonial
4 statement. Finally, a preponderance of the evidence demonstrates the
5 inference to be drawn by the defense is a fair one.

6 B. The statements by President Barack Obama. This is
7 admissible under M.R.E. 801(d)(2)(D). The substance of the
8 statement, specifically that the released information doesn't reveal
9 any issues that haven't already informed our public debate on
10 Afghanistan, is an assertion of fact and likely one inconsistent with
11 the position taken by the government at trial. This statement by the
12 President was delivered under formal circumstances and presented to
13 the media in the Rose Garden to be distributed to the public. The
14 primary purpose of the statement was to convey the information to the
15 public and this direct assertion of fact in all probability had to be
16 confirmed by the government. The statement is, therefore, viewed
17 with the reliability that is the hallmark of a testimonial statement.
18 Finally, a preponderance of the evidence demonstrates the inference
19 to be drawn by the defense is a fair one.

20 C. The 16 August 2010 letter from Secretary of Defense
21 Robert M. Gates to Senator Carl Levin, Chairman, Senate Committee on
22 Armed Forces, is admissible under M.R.E. 801(d)(2)(D). The substance
23 of the statement, specifically that the released information does not

1 reveal sources and methods is an assertion of fact and one -- likely
2 one inconsistent with the position taken by the government at trial.
3 The statement by Secretary Gates was delivered under normal
4 circumstances in response to a letter from Senator Carl Levin and
5 published in an official letterhead. The primary purpose of the
6 letter was to convey information to the Chairman of the Senate
7 Committee on Armed Services and the public and the direct assertions
8 of fact contained therein in all probability had to be confirmed by
9 the government. The statement is, therefore, viewed with the
10 reliability that is the hallmark of a testimonial statement.
11 Finally, a preponderance of the evidence demonstrates the inference
12 to be drawn by the defense is a fair one.

13 D. The statement by Secretary of Defense Robert Gates on
14 30 November 2010 during a joint DoD news briefing with the Chairman,
15 Joint Chiefs of Staff, Admiral Mike Mullen is not admissible under
16 M.R.E. 801(d)(2)(D) and the court declines to judicially notice the
17 statement. The statement is not an assertion of fact. It is one of
18 personal belief; quote, I think those descriptions are fairly
19 significantly overwrought. Despite the formal circumstances under
20 which the statement is made, e.g., a DoD news briefing with the
21 Chairman of the Joint Chiefs of Staff, the court finds the primary
22 purpose of the statement was not an assertion of unambiguous factual
23 matter but a political one. Secretary Gates was addressing the Press

1 Corps and explaining the repeal of Don't Ask, Don't Tell law when a
2 question arose regarding the information shared among the
3 intelligence community. Secretary Gates was attempting to minimize
4 the release of the information on U.S. foreign policy. Persuasive
5 speech of this kind is not a direct assertion of fact and in all
6 probability -- that in all probability had to be confirmed by the
7 government or is easily rebutted by similar assertions.

8 E. The statement by Secretary of State Hillary Rodham
9 Clinton, published on the Department of State Web site on 1 December
10 2010 is not admissible under M.R.E. 801(d)(2)(D) and the court
11 declines to judicially notice the statement. To begin, the statement
12 is not an assertion of fact. It is one of personal belief; quote, I
13 think there's a lot to be said about what it shows about the foreign
14 policy of the United States. Despite the formal circumstances under
15 which the statement was made, e.g., a declaration by a Secretary at
16 the World Security Summit, the court finds the primary purpose of the
17 statement was not an assertion of unambiguous factual matter but a
18 political one. Secretary Clinton was attempting to bolster support
19 among world leaders and top diplomats. Despite the alleged security
20 violations, persuasive speech of this kind is not a direct assertion
21 of fact that in all probability had to be confirmed by the government
22 or easily rebutted by similar assertions.

1 F. The statements made by Secretary of State Hillary
2 Rodham Clinton published in *USA TODAY* on 1 December 2010 and CNN.com,
3 NewYorkTimes.com, and UPI.com on 4 December 2010 are not admissible
4 under M.R.E. 801(d) and the court declines to judicially notice the
5 statements. To begin with the statements are not an assertion of
6 fact. It is one of personal belief. I think I'll have some outreach
7 to continue doing over the next weeks. The court finds that the
8 statements in this interview are not the functional equivalent of
9 testimonial statements. The statements were ostensibly made off
10 camera but on the record. Nevertheless, the court finds that the
11 primary purpose was not an assertion of unambiguous factual matters
12 but a political one. Secretary Clinton was, once again, attempting
13 to reestablish trust with the world leaders through diplomacy.
14 Persuasive speech of this kind is not a direct assertion of fact; in
15 all probability had to be confirmed by the government.

16 G. The undated statement made by Vice President Biden
17 during a one-on-one interview with Correspondent -- NBC Correspondent
18 Andrea Mitchell is not admissible under M.R.E. 801(d)(2)(D) and the
19 court declines to judicially notice the statement. The statement is
20 not an assertion of fact. It is one of personal belief; quote, I
21 don't think there's any damage, unquote. The court finds the
22 statements in this interview are not the functional equivalent of
23 testimonial statements. The statements of the Vice President were

1 not -- are not formally prepared remarks. They're off-the-cuff
2 responses to questions and include phrases as, "Sure I did"; "Sure
3 they are"; "Well, look. I love the Senate. I love Congress." The
4 nature of these statements themselves, including the qualifying
5 language, "I don't think there's any damage," do not support the
6 principle that the statements are testimonial in nature. Moreover,
7 the topics discussed during the interview cover a broad range of
8 topics from the Vice President's relationship to the President to the
9 death of Richard Holbrooke. In fact the interview concluded with a
10 holiday message from the Vice President to service members in Iraq.
11 These statements are not a direct assertion of fact that in all
12 probability had to be confirmed by the government and are easily
13 rebutted by similar assertions.

14 In light of the defense [pause] -- all right, the court
15 is going to take a brief recess. The quality of the toner in the
16 court's printer deteriorated at the end of the printing of this
17 opinion, so the court is going to take a brief recess; ask the
18 government to have an administrative personnel come with a new toner
19 so I can reprint the opinion and it will be a little more legible for
20 me to read in court.

21 TC[MAJ FEIN]: Yes, ma'am.

22 MJ: Court is in recess; 15 minutes long enough to do that?

23 TC[MAJ FEIN]: Yes, ma'am.

1 MJ: Court is in recess.

2 [The Article 39(a) session recessed at 1349, 18 October 2012.]

3 [The Article 39(a) session was called to order at 1414, 18 October
4 2012.]

5 MJ: This Article 39(a) session is called to order. Let the
6 record reflect all parties present when the court last recessed are
7 again present in court.

8 And the court's toner issues have been resolved.

9 Okay, as I was announcing my opinion earlier, I had
10 completed the admissibility paragraph of the statements of Vice
11 President Biden under Military Rule of Evidence 801(d)(2)(D).

12 H. The statement made by Honorable John Conyers, Jr., on
13 16 December 2010, during a congressional hearing on the Espionage Act
14 and the legal and constitutional issues raised by Wikileaks is not
15 admissible under M.R.E. 801(d)(2)(D) and the court declines to
16 judicially notice the statement. The statement is not an assertion
17 of fact. It is one of personal belief. "We are too quick to accept
18 government claims of risk to national security." Despite the formal
19 circumstances under which the statement was made, e.g., an
20 on-the-record committee hearing, the court finds the primary purpose
21 of the statement is not an assertion of an unambiguous factual matter
22 but a political one. Congressman Conyers was attempting to get the
23 public and the press to slow down; take a closer look at the alleged

1 security violations. These statements were not a direct assertion of
2 fact that in all probability had to be confirmed by the government or
3 are easily rebutted by similar assertions.

4 The statement sought to be introduced by the defense is
5 primarily hearsay within hearsay, as Congressman Conyers is quoting
6 Secretary Gates. Congressman Conyers' remarks regarding his
7 perspective on the government leaks is irrelevant to any issue of
8 material fact in the case. Finally, this court finds an additional
9 impediment to admissibility of this statement as the declarant is a
10 member of the legislative, not the executive, branch of government
11 and the legislature is not a party-opponent in the proceeding.
12 *United States v. North*, 910 F.2d 843, 906-911, D.C. Circuit 1990.

13 2. Admissibility of statements as public records under
14 M.R.E. 803(8).

15 A. As an additional basis for admission, the court finds
16 that the 16 August 2010 letter from Secretary Gates admissible under
17 M.R.E. 803(A) -- (8)(A). It is a record of activity setting forth
18 the activities of the Department of Defense.

19 B. The remaining statements are not admissible under
20 M.R.E. 803(A) [**sic**]. Newspaper articles are not public records.
21 Press releases by government officials under circumstances of this
22 case do not set forth the activities of the agency. If such press
23 releases were admissible under M.R.E. 803(8)(A), such pronouncements

1 by government officials offered by the government against the accused
2 would be similarly admissible.

3 Finally, a congressional record would be admissible under
4 M.R.E. 803(A) [sic] if relevant. The opening statement and the
5 personal opinion of Congressman Conyers regarding his perspective on
6 government leaks is irrelevant to any issue of material fact during
7 sentencing proceedings.

8 10. Admissibility of comments made by government
9 officials for a non-hearsay purpose. The government provides the
10 statements by -- therefore, the court finds the statements by Mr.
11 Morrell, President Obama, and Secretary Gates at Enclosures A through
12 C of the 13 September 2012 defense supplement are also admissible as
13 non-hearsay in that the fact that the public statements of these
14 government officials were made is circumstantial evidence of
15 minimized damage caused by the alleged WikiLeaks disclosures.

16 Similarly, the statements made by Secretary Gates and
17 Secretary Clinton in DoD press releases, Enclosures D and E, are
18 similarly admissible for the non-hearsay purpose.

19 The statements by Secretary Clinton and Vice President
20 Biden, Enclosures F and G, are similarly admissible for non-hearsay
21 purpose only if the newspaper article within which the statements
22 appear qualify for a hearsay exception.

1 The statement by Congressman Conyers Jr. in the
2 congressional record, Enclosure H, is not admissible for a non-
3 hearsay purpose because his personal opinion on government leaks is
4 irrelevant to any issue of material fact during sentencing
5 proceedings.

6 11. The admissibility of comments made by government
7 officials in newspaper articles under M.R.E. 804, 803(6), and 807.

8 A. The articles made by Secretary -- excuse me -- by
9 government officials in newspaper articles or articles published on
10 the Internet are hearsay within hearsay. Newspaper articles do not
11 qualify as business records under M.R.E. 803(6). *U.S. v. Robinson*,
12 43 M.J. 501, Air Force Court of Criminal Appeals 1992; *U.S. v.*
13 *Michtavi*, 155 F.App'x, A-p-p-x, 433, 11th Circuit 2005; *Nooner v.*
14 *Norris*, 594 M.J. 592, 8th Circuit -- or, excuse me, that's an
15 incorrect cite -- 8th Circuit 2010. Thus statements made in
16 newspaper articles where the reporter is not produced as a witness
17 for hearsay within hearsay, even if there is a hearsay exception for
18 the statement or the statement is admitted for a non-hearsay purpose.

19 B. The newspaper articles at issue are also not
20 admissible as residual hearsay under Military Rule of Evidence 807.
21 Residual hearsay should be used sparingly and requires that the
22 statement be more probative on the point for which it is offered than
23 any other evidence which the proponent can procure through reasonable

1 efforts. *United States v. Kindle*, 45 M.J. 284, Court of Appeals for
2 the Armed Forces (1996), citing *Larez v. City of Los Angeles*, 946
3 F.2d 630, 644, 9th Circuit 1991, testimony of newspaper reporters
4 more probative than copies of newspaper articles. Additionally,
5 there's no way to know whether the government officials quoted were
6 quoted in part or in toto.

7 Finally, the online interview of Vice President Biden at
8 Enclosure G is undated. None of the newspaper articles at issue bear
9 the circumstantial guarantees of trustworthiness required for
10 admissibility under Military Rule of Evidence 807.

11 Conclusions of Law - Sentencing:

12 Should the defense move the court to relax the rules of
13 hearsay and authentication pursuant to R.C.M. 1001(c)(3), the court
14 will permit the defense to admit the exhibits at Enclosures D through
15 G in extenuation or mitigation or both at sentencing. The court will
16 take judicial notice of the existence of the statements in D through
17 F. The court will not take judicial notice of the existence of the
18 interview at Enclosure G unless the defense provides evidence of the
19 date of the interview.

20 Relaxation of the rules under R.C.M. 1001(c)(3) does not
21 relax the rules of evidence with respect to relevance. The statement
22 by Congressman Conyers Jr., Enclosure H, is not relevant for
23 sentencing and is not admissible under relaxed rules.

1 Ruling:

2 The defense motion for judicial notice of public
3 statements is granted in part.

4 1. The statements by Mr. Morrell, President Obama, and
5 Secretary Gates at Enclosures A through C are admissible as
6 substantive evidence and the court will take judicial notice of the
7 press releases in Enclosures A and B and the letters in Enclosure C.

8 2. These statements at Enclosures A through C and the
9 statements by Secretary Gates and Secretary Clinton at Enclosures D
10 and E are admissible for a non-hearsay purpose as public statements
11 made by government officials that provide circumstantial evidence of
12 minimized damage caused by the alleged WikiLeaks disclosures. The
13 court will take judicial notice of the existence of these press
14 releases, including the statements.

15 3. The statements made by Secretary Clinton and Vice
16 President Biden at Enclosures F and G are hearsay within hearsay and
17 are not admissible for the non-hearsay purpose in paragraph 2 unless
18 the defense requests that the rules be relaxed for these statements
19 under R.C.M. 1001(c)(3). If the rules are relaxed, the court will
20 take judicial notice of the newspaper articles in -- article in
21 Enclosure F. If the court provides evidence of the date of the
22 interview of Vice President Biden in Enclosure G, the court will take
23 judicial notice of the interview.

1 4. The statement by Congressman Conyers Jr. is not
2 relevant and is not admissible.

3 So ordered this 18th day of October, 2012.

4 I do want to state for the record, I stated earlier when
5 going through the admissibility of M.R.E. -- the statements under
6 M.R.E. 801(d)(2)(B) and (D), I had said that some -- I would not take
7 judicial notice on Enclosures D, E, F, and G; that was incorrect.
8 The appropriate rule -- appropriate judicial notice that I will or
9 will not take is at the end of the ruling that I just said, 1 through
10 4.

11 Is that clear to the parties?

12 CDC[MR. COOMBS]: Yes, Your Honor.

13 MJ: Okay, anything ----

14 TC[MAJ FEIN]: Yes, Your Honor.

15 MJ: ---- else we need to address with this issue?

16 CDC[MR. COOMBS]: No, Your Honor.

17 TC[MAJ FEIN]: No, Your Honor.

18 MJ: All right, and this will be Appellate Exhibit 356.

19 All right, is there anything we need to address before we
20 proceed to the motion to compel witnesses for the speedy trial
21 motion?

22 CDC[MR. COOMBS]: No, Your Honor.

23 TC[MAJ FEIN]: No, Your Honor.

1 MJ: All right, Defense, you have filed a reply to the
2 government's response to the defense motion to dismiss for lack of
3 speedy trial.

4 CDC[MR. COOMBS]: That is correct, Your Honor; that's at
5 Appellate Exhibit 354.

6 MJ: Now I met with counsel prior to coming on the record
7 today to talk about the order of march and the events that were going
8 to transpire today; and one of the issues that I brought up and I
9 told Mr. Coombs I was going to put on the record is I received this
10 reply, Appellate Exhibit 354, at midnight last night, and the defense
11 wants me to consider it today in ruling on their motion to compel
12 production of witnesses. This is not the first time I have gotten a
13 lot of documents and moving bases for admissibility and other things
14 right on the eve of what I have as a decision in a motion. For
15 example, the public statements, I had to order supplemental briefs
16 because I received a large volume of case law and additional bases
17 for admission when the argument was scheduled at the last Article
18 39(a) session. Certainly proper for the defense to file whatever it
19 wants to file. The concern I have as the court is we had the speedy
20 trial motion scheduled in a week from Monday. The government has to
21 have time to produce witnesses that I order produced, and the court
22 is just simply not capable of adjust -- of having large volumes of
23 information at the last minute with a decision expected immediately.

1 The defense can certainly properly file these motions. The court
2 requires time to consider these motions, and if that time rubs up
3 against the government's ability to actually be able to get some of
4 the witnesses that I may order produced that's going to cause delay
5 and that delay is going to be excludable.

6 Does the defense understand that?

7 CDC[MR. COOMBS]: The defense does, Your Honor; and just for the
8 record, the filing from last night, 354, was within the permitted
9 time requirements under the court's scheduling order, but the defense
10 obviously does understand and appreciates the amount of information
11 that went into that, the requirement of the judge to read and digest
12 that, and then be able to make determinations on a hearing that's
13 going to be a little over a week from now. So certainly understand
14 the time constraints with the judge and obviously would have provided
15 the reply on a sooner date but we only got the response on the 10th
16 of October, which was an 80-page response to our initial, I guess,
17 117-page motion, and then this, of course, is a 50-page reply, so
18 right there that's quite a bit for the judge to read and certainly
19 the defense ----

20 MJ: Well not considering, though, as well ----

21 CDC[MR. COOMBS]: ---- appreciates that.

22 MJ: ---- the enclosures that ----

1 CDC[MR. COOMBS]: Right, although I will say the government's
2 enclosures are a little bit more numerous than the defense's.

3 MJ: I understand that, Mr. Coombs. My point is, you know,
4 we've got a motion for a speedy trial coming. There's a little bit
5 of a crunch between a speedy trial and, you know, a lot of paper
6 being filed on the eve of something that I have to decide. I mean,
7 there's the potential that that is going to cause delay.

8 CDC[MR. COOMBS]: Understood, Your Honor.

9 MJ: All right, proceed.

10 CDC[MR. COOMBS]: Your Honor, I know about a week and a half
11 from now I'll be able to go into much more detail on the issue of
12 R.C.M. 707 or Article 10, so I don't want today to be where I do, I
13 guess, a pre-argument on that; instead, I'll just concentrate on the
14 witnesses that we are trying to compel and the general basis why.

15 But before I do, I think it's important to note that as
16 our motion points out, the government bears the burden of persuasion,
17 both under an R.C.M. 707 and also an Article 10 speedy trial motion.
18 In this instance, the government apparently intends to meet its
19 burden through the production of three witnesses. They want to
20 produce Colonel Coffman, who was the special court-martial convening
21 authority and the individual who granted under R.C.M. 707 522 days of
22 excludable delay. I understand that Colonel Coffman is deployed and
23 so there is an issue of whether or not he will be available

1 telephonically or in person. Certainly, under -- even understanding
2 him being deployed, the defense's request and preference would be
3 obviously in person, given the fact that the court will need to be
4 able to see Colonel Coffman. There's probably the reason for
5 refreshing his memory, more than likely, given the amount of time
6 that's transpired, so that will necessitate handing him documents.
7 Again, I know the government is attempting to bring him in person.

8 The second witness the government intends to produce is
9 Lieutenant Colonel Paul Almanza, the Article 32 investigating
10 officer; and third is Mr. Bert Haggett. Apparently, Mr. Bert Haggett
11 is going to come to explain in general the classification and review
12 process, not anything really in this case but just the general
13 process and that classification reviews apparently take a while.

14 Mr. Haggett, while he may be qualified to testify to
15 that, the real issue is why did the classification reviews in this
16 case take a while; and that gets to the witnesses that the government
17 is opposing. And what I would like to do is break these witnesses
18 into two groups, and my motion -- the initial motion does this, but
19 pre-referral delay and post-referral delay.

20 So of our witnesses that the government opposes, we have
21 three -- well two and a group of witnesses that fall into the pre-
22 referral, and I should have probably done this before I started, Your
23 Honor, but our initial motion is Appellate Exhibit 256; the -- excuse

1 me, for the requested witnesses, it's 256; our updated request for
2 witnesses is Appellate Exhibit 334; and our motion to compel is
3 Appellate Exhibit 338.

4 MJ: All right, may I have the government's response as well;
5 that would be Appellate Exhibit?

6 TC[MAJ FEIN]: Your Honor, the government -- it was not a
7 programmed encounter and didn't have time to do a written response to
8 the motion to compel ----

9 MJ: No, I mean to the defense request for witnesses.

10 TC[MAJ FEIN]: Yes, Your Honor.

11 **[Pause]**

12 MJ: All right, the prosecution response is at Appellate
13 Exhibit 337 to the defense witness request.

14 TC[MAJ FEIN]: Yes, Your Honor.

15 MJ: And then the defense updated witness request is Appellate
16 Exhibit 334.

17 CDC[MR. COOMBS]: And then the motion to compel is 338. The
18 other two, in addition to Appellate Exhibit 354, which is the reply,
19 the motion to dismiss is Appellate Exhibit 326; and the government's
20 response is at Appellate Exhibit 339.

21 MJ: And has the government filed as an appellate exhibit its
22 initial witness list for the speedy trial motion?

23 TC[MAJ FEIN]: Yes, Your Honor.

1 [Pause]

2 TC[MAJ FEIN]: Your Honor, Appellate Exhibit 336, the government
3 witness list for speedy trial.

4 MJ: All right, thank you, and I believe that's all the
5 documents that have been filed with respect to this issue.

6 CDC[MR. COOMBS]: It is, Your Honor.

7 MJ: Proceed.

8 CDC[MR. COOMBS]: Okay. Your Honor, the first witness is Master
9 Sergeant Monica Carlile. As the defense's filing show, Master
10 Sergeant Carlile, then Sergeant First Class Carlile, was a paralegal
11 within the MDW SJA shop; and we are calling her in order to testify
12 regarding an excludable delay memorandum that she signed for Colonel
13 Coffman on 22 April 2011.

14 MJ: Have you talked to her?

15 CDC[MR. COOMBS]: We've tried, Your Honor, and I have not been
16 able to actually reach her.

17 MJ: How have you tried?

18 CDC[MR. COOMBS]: By calling, Your Honor, but I have not been
19 able to reach her.

20 MJ: Is she currently stationed at the Military District of
21 Washington?

1 CDC[MR. COOMBS]: I believe so, Your Honor. I listed an updated
2 information contact for her, and I don't know if she's tried calling
3 my office back or not, but apparently ----

4 MJ: Have you asked the government to help you?

5 CDC[MR. COOMBS]: I've not. I -- my intent, Your Honor, given
6 the scope of what her testimony would be, is to talk about why on
7 that day she signed for Colonel Coffman, given especially the
8 requirement under Article 10 -- or, excuse me, Article 7 -- R.C.M.
9 707 that the convening authority exercise independent discretion.

10 MJ: I understand that, Mr. Coombs. The concern I have, as
11 I'm looking through your witness list, is that in United States v.
12 Rockwood, which sets forth basically the standard on R.C.M.

13 703(c) (2) (B) (i), ----

14 CDC[MR. COOMBS]: Right, Your Honor.

15 MJ: ---- it says, "Moreover, the requirement for a synopsis
16 of expected testimony is not satisfied by merely listing the subjects
17 to be addressed. It must set out what the witness is expected to say
18 about those subjects," which means that you've talked to the witness;
19 and if she just says that he made this decision and he called me and
20 told me I've made the decision, I've looked at all the documents, and
21 I've signed them, then why does that witness need to be produced?

22 CDC[MR. COOMBS]: Well again, Your Honor, the -- I would grant
23 you on Sergeant Carlile and then the unnamed witnesses that we could

1 not identify, along with Dr. Sweda we have not been able to interview
2 and part of that has been just the process of litigation in the case
3 and unfortunately ----

4 MJ: So defense ----

5 CDC[MR. COOMBS]: ---- calling ----

6 MJ: ---- needs a delay to interview these witnesses?

7 CDC[MR. COOMBS]: No, Your Honor. I believe that the proffer as
8 to what they would testify to indicates clearly why they're relevant.

9 MJ: It doesn't say what they will say. That's what you have
10 to proffer to the court; that you've talked to these people. This
11 isn't the place for discovery.

12 CDC[MR. COOMBS]: Understood, Your Honor, but in this instance,
13 then, for both Master Sergeant Carlile and Dr. Sweda, the testimony
14 that they would be providing goes -- and I understand that the court
15 is saying, well, what are you -- what will they testify to? Our
16 proffer, obviously, shows why they're relevant; what they would
17 actually say, then, I understand that that's what the court would
18 want to have and we could if -- again, if the -- if needed then
19 trying to track them down to have them respond, I could get that
20 information for the court. I believe, though, based upon our proffer
21 as to why they're relevant, what they are going to testify to is
22 clear from the documents; that I was asked to sign for him. In this
23 case, Master Sergeant Carlile being a paralegal within the SJA shop

1 simply just signed for the document; and even if Colonel Coffman
2 said, Hey, look, yeah, whatever, go ahead and sign for me, that would
3 be relevant to whether or not he exercised independent discretion and
4 whether or not this was just simply a rubber stamp process, and
5 that's exactly what the defense is maintaining in its motion.

6 The other witnesses that I'll go through, we've been
7 unable to identify who those individuals would be.

8 MJ: Have you asked the government?

9 CDC[MR. COOMBS]: No, Your Honor, we have not. We've asked the
10 government to produce at the Article 32 the relevant OCAs -- or the
11 relevant witnesses, but when you take a look at -- and that's why the
12 reply is important -- when you take a look at the documentation that
13 we get from the government, it's essentially, hey, look, this is how
14 long it took so trust us; and the information doesn't answer basic
15 questions that only these individuals could ask -- or answer and that
16 is, you know, what were you doing on that time? How long did it take
17 you to do certain things? The government says none of that's
18 relevant; only what's relevant is what they do and case law would
19 disagree with that. So -- and I can go through the rest of the
20 witnesses, but for the most part, these other witnesses due to the
21 classified nature of the information the only person that -- the only
22 way the defense could know is if the government identifies who those

1 individuals are and that's why the defense has asked: Identify a
2 person who can be responsive to these questions.

3 So going to now, just again, with the pre-referral, you
4 have Master Sergeant Carlile, as I talked about. The next person is
5 Dr. Michael Sweda. Dr. Sweda was the president of the 706 board; and
6 in the government's motion, they indicate that there were dates in
7 which essentially the board needed extensions of time. And again
8 here, then Dr. Sweda would come testify as to why the board needed
9 the extensions of time.

10 MJ: Isn't that already in the government e-mails?

11 CDC[MR. COOMBS]: It is not, as far as ----

12 MJ: And the request for delay that were submitted?

13 CDC[MR. COOMBS]: No, Your Honor. The appellate -- the
14 Attachment 2 to our reply lays out a e-mail exchange between the
15 government and Dr. Sweda. Dr. Sweda's trying to work out dates for
16 the board to meet, and he's willing to meet during the weekday and
17 he's working around the leave request of one of the members of the
18 board and generally just a requirement of getting three board members
19 together to meet in the SCIF; that's the main thing that kind of
20 holds up the 706 board.

21 The government has placed a requirement that the board
22 meets on the weekend, and they wanted to do that, apparently, to
23 limit PFC Manning's interaction with people when he goes to the SCIF

1 in order to do the 706 board. As lofty of a goal that -- as that may
2 be or legitimate goal that may be, it was clear that that is what
3 required multiple delays in time as to actually having the board meet
4 with PFC Manning in the SCIF.

5 MJ: I understand your argument, Mr. Coombs. The issue I'm
6 having is how does this witness -- I mean you already had that
7 information; why does this witness need to come?

8 CDC[MR. COOMBS]: Well, again, what would happen with Dr. Sweda
9 -- I mean the government is going to and they have maintained a
10 different opinion as to why the 706 board was delayed. They indicate
11 that it was based upon the defense, you know, having -- wanting to
12 meet with our client prior to the board and then having to move it
13 because I couldn't arrange for a flight that wasn't cost prohibitive
14 at that time. E-mails, again, will -- which are part of ----

15 MJ: I saw the government's assertion. I saw your response
16 that the e-mails don't say that, okay.

17 CDC[MR. COOMBS]: Correct, Your Honor. And so Dr. Sweda would
18 be the individual who would testify as to (1) he was identified as
19 the president of the board way back on 3 March of 2011, when the
20 convening authority appointed the 706 board. The e-mails show that
21 as of 8 December 2011, the government didn't know who the other board
22 members would be. When I asked the question, and that's the e-mail

1 Attachment 1, who's the other board members? Don't know yet; still
2 working; we'll get that information to you this week.

3 Then you see ----

4 MJ: And how is Dr. Sweda's testimony going to help that?

5 CDC[MR. COOMBS]: Well Dr. Sweda can testify as to what was
6 happening, if anything, between the time that he was appointed to the
7 board on 3 March of 2011 to the completion of the board on 22 -- 3
8 March 2000 and -- yeah, 11 and the completion of the board on 22
9 April 2012.

10 MJ: Okay, once again, you've tried to talk to the doctor?

11 CDC[MR. COOMBS]: On Dr. Sweda, Your Honor, no, I have not.

12 MJ: Okay.

13 CDC[MR. COOMBS]: Now the various OCAs. Here the government
14 from the time period of 22 April forward of -- after the board was
15 completed of 22 -- I misspoke -- 22 April 2011, when the board was
16 completed forward, the government continued to put in requests for
17 delays; and these requests for delays were based upon the requirement
18 that they believed that they had for a classification review; and
19 it's clear when you -- when Your Honor looks at the requests for
20 delays, each one of them was based upon the requirement to get a
21 classification review and to get authorization from the OCAs to use
22 the requested information.

1 If you go from the date when pretrial confinement was
2 started to the date in which they finally got the classification
3 reviews completed, you are looking at a period of almost 530 days;
4 and the problem comes into play is why did the government take this
5 long to do that? The government wants to avoid having any of those
6 questions asked and instead just simply says that the convening
7 authority approved the delays and the delays were reasonable because
8 that's how long it took to complete the process. But when the court
9 takes a look at our motion, you'll see a couple things. First, we
10 maintain that the classification reviews were not required for the
11 Article 32 hearing to be held up.

12 MJ: And what's -- what's the basis for that?

13 CDC[MR. COOMBS]: Well their basis ----

14 MJ: Didn't you ask for them?

15 CDC[MR. COOMBS]: We asked for the classification reviews once
16 they were completed, yes, Your Honor, in discovery, but -- so that's
17 whenever the classification reviews were completed, but there's
18 nothing in the *Manual for Courts-Martial* nor is there anything in any
19 rule that would require the classification reviews prior to an
20 Article 32 hearing; that was a responsibility that the government put
21 on its own. They could have gone forward much earlier if they
22 decided to do so, but ----

1 MJ: Okay, I got all that. How are these classification --
2 original classification authorities -- you had -- I guess you had the
3 information in the package to make that argument. Why do you need
4 the testimony of these people?

5 CDC[MR. COOMBS]: Well because the original classification
6 authorities are only -- the only individuals who can answer some key
7 questions that would go to whether or not the delay was reasonable,
8 because the government's position is this is how long it took and,
9 therefore, that's why it's reasonable; that's their default position.
10 The activities of an agency are not relevant. You only look at the
11 activities of the prosecution, and the defense cite case law that
12 says that's not the case.

13 MJ: I've seen that. Have you made any attempt to talk to any
14 of these witnesses?

15 CDC[MR. COOMBS]: There's no way to identify the witness that
16 could answer these questions, and the questions I'd ask are: When
17 did the government actually contact you for a classification review?
18 You see the 18 March 2011 memorandums where the government seems to
19 indicate that that's the date in which they reached out for the
20 classification reviews, and they want the court to, I guess, believe
21 that it took 8 months to complete these from that point, but when you
22 look at the 18 March 2011 memorandums, you'll see it says we request

1 that you finalize your classification review, not that you start or
2 you begin but you finalize your classification review.

3 MJ: Wasn't there also one to the Deputy Chief of Staff for
4 Intelligence on the 30th of November, 2010?

5 CDC[MR. COOMBS]: That -- yes, and that was, as well, for the
6 Department -- yes, for the Department of Defense; that's the one
7 exception. All the others fall under 18 March 2011.

8 MJ: Okay.

9 CDC[MR. COOMBS]: But the defense's position is it's clear that
10 the government must have been asking for these earlier than 18 March
11 2011. The questions, though, that need to be asked, then, is not
12 only when were the classification reviews actually asked for but how
13 long did it really, then, take to complete these classification
14 reviews? How many people from the OCA was tasked to actually
15 complete the classification review? How often did they work on it?
16 Did they work -- was there breaks in time period for any particular
17 reason when they couldn't complete the classification reviews? How
18 many times did the government come to them, because their chronology
19 and even in their motion, it doesn't look like they ever really
20 prompted, other than a couple of times, the OCAs to complete these
21 classification reviews, even though it was delaying the Article 32
22 hearing a total of 233 days; twice almost the speedy trial clock.

1 And when you look at the actual classification reviews,
2 that's when it becomes very troubling, because these are not *War and*
3 *Peace* novels that are being done by the OCAs. On average they range
4 to 3 pages to no more than 51 pages.

5 MJ: Is that -- well I just assume I'll be educated on this
6 during the motions week, but does that necessarily correlate? I mean
7 you could be viewing hundreds of thousands of documents and come up
8 with a three-page determination on all of them, right?

9 CDC[MR. COOMBS]: That is correct, and that's why the OCA would
10 be needed in order to answer is this time reasonable, because the
11 government misses the connection. They say it took, you know in this
12 case, 530 days; therefore, it's reasonable; but in order for it to be
13 reasonable, you have to show that the 530 days was the time that it
14 took to complete these things, not that you just took 530 days;
15 otherwise, you could say, well, you know, if the OCAs take 5 years,
16 well, that's how long it took; that's reasonable, so that's the
17 disconnect here and that's where the OCAs coming to testify could
18 explain.

19 But when you take a look at what a classification review
20 actually does, it says that at the time of the disclosure the
21 information was classified. The information still is classified, and
22 what would be the impact from that?

23 MJ: Uh-huh **[affirmative response]**.

1 CDC[MR. COOMBS]: These are not difficult answers to make, and
2 as we look through the classification review by Vice Admiral Harward,
3 and he may be the witness that would have the ability to testify to
4 this, covered the vast majority of the information on the charge
5 sheets, Specifications 5, 6, 7, 8, 10, 11 of Charge II, and it was a
6 total of 3 pages with an enclosure just referencing what the
7 information was of a total of 24 pages, but the actual classification
8 review was 3 pages. The -- Rear Admiral Donegan in Specification 11
9 of Charge II, it was 2 pages. Rear Admiral Woods did Specifications
10 8 and 9 of Charge II, it was 4 pages. OGA 1 was less than 10 pages,
11 and then Ambassador Patrick Kennedy, his was the longest; it was 51
12 pages. All these things are less -- almost less than the -- well
13 they are, for the most part, less than the reply motion by -- filed
14 by the defense if you include our attachments. And so the question
15 that we have to ask is why did it take so long, and the government
16 never answers that question. And what's also troubling is when you
17 take a look at the *Pyburn* case, which -- the *Pyburn* case, which is a
18 1974 Westlaw 13919, it's very similar to this case where the trial
19 counsel waited for an outside laboratory to complete its review, and
20 in that case it was only 62 days, and there the Court of Military
21 Appeals said that that didn't show diligence; and here we have if you
22 go from their 18 March you've got 233 days when they notified the

1 OCAs, but if you go from the beginning of this case, you've got 530
2 days before the OCAs completed ----

3 MJ: Well how can you go from the beginning of this case,
4 because the case hadn't been investigated yet; the government just
5 found out what occurred from Mr. Lamo; is that true?

6 CDC[MR. COOMBS]: This is just the time period though, Your
7 Honor. I grant you you're going to have a time period where you have
8 to figure out what the charges are, and that's another one of the red
9 herrings that the government throws out, which we'll talk about next
10 week, of kind of the rolling disclosures. The government knew early
11 on what information was out there, and you can see that from the
12 Information Review Task Force; you can see that from the Department
13 of State, knowing that it was in Net-Centric Diplomacy Database, but
14 the one issue that you can't get around is the OCAs took a very, very
15 long time to do this, and it was the reason why the 32 was delayed
16 almost 8 months.

17 MJ: Do you remember offhand the exhibit in the government's
18 response that -- or was it in the defense -- what has the special
19 court-martial convening authority delays?

20 CDC[MR. COOMBS]: I think it's Enclosure 18, Your Honor.

21 MJ: Of the government's or the defense?

22 CDC[MR. COOMBS]: Of the government's, Your Honor. If it's not,
23 it's -- Enclosure 18 and there's, I believe, Enclosure 20.

1 TC[MAJ FEIN]: Your Honor, I think Enclosure 12 to the
2 government's reply.

3 MJ: Right. **[Pause]** I have it; thank you.

4 Well I -- this is the delays approved. I'm looking for
5 the reasons. Is there ----

6 TC[MAJ FEIN]: So ----

7 MJ: ---- the memoranda that talk about the reasons.

8 TC[MAJ FEIN]: Yes, Your Honor. Enclosure -- well Enclosure 11,
9 Your Honor, is the government's filings with the convening authority,
10 what the defense received; that's Enclosure 11 with the reasons and
11 updates specifically delineated.

12 MJ: All right, thank you.

13 Go ahead.

14 CDC[MR. COOMBS]: Okay, Your Honor.

15 So in this case when you take a look at the amount of
16 time, the witnesses that we're requesting and, again, it's difficult
17 for the defense to identify because the witness from the OCA has to
18 be able to answer why it took so long; how many people they had
19 working on it; how often they worked on it; were there any
20 circumstances that required them to stop working on it for a period
21 of time; was this a reasonable amount of time; was there any delay
22 that they could indicate is why it took them so long to complete the
23 task; how often does the government check in with them; things that

1 are not answered in the government's response motion or any of their
2 filings.

3 MJ: All right, Mr. Coombs, I understand, you know, again,
4 looking at the earlier witnesses, you didn't talk to them. Have you
5 made any attempt to talk to any of these people or anybody working
6 for any of these people or -- through the government?

7 CDC[MR. COOMBS]: Yes, I did. You know, prior to the Article
8 32, I tried to call these witnesses, which would then have given me
9 the ability to bring out some of this information. I've listed and,
10 of course, was -- those witnesses were denied. I've listed these
11 witnesses now on this witness list, and, you know, I've indicated in
12 the witness list that I can't identify who the appropriate person
13 would be, only the government could; otherwise, I'd be just calling
14 up the various OCAs saying, "Can anyone talk to me about this?"
15 which, of course, would probably be classified so I'd have to notify
16 the government that I want to talk to somebody in order to find out
17 who could answer some of these questions.

18 MJ: Okay.

19 CDC[MR. COOMBS]: So the defense requests that the court order
20 the government to produce a witness with knowledge from each of the
21 OCAs that could testify regarding, at the very least, the 233 days
22 from the date in which the government requested them to finalize
23 their classification reviews and ----

1 MJ: Why do you want ----

2 CDC[MR. COOMBS]: ---- the date ----

3 MJ: ---- why do you want CYBERCOM; didn't they do theirs
4 early?

5 CDC[MR. COOMBS]: They did, as well, Your Honor, but that would
6 -- that would talk about, again, the -- when they were asked how many
7 people they had tasked to it up till they completed it, because one
8 of the classification reviews, even though the government initially
9 said it wasn't a classification review, done by 1st CAV on the video
10 in Specification 2 of Charge II, which was three pages, was completed
11 on 23 August 2010; and the government said, well, no, that's -- that
12 was not a classification review and they point to, which we got in
13 discovery now, a one-page classification review of the same video by
14 Real -- excuse me -- Rear Admiral Donegan, which was done on
15 13 October 2010. But in any event in their motion they say that this
16 first one by 1st CAV was, in fact, a classification review; that
17 classification review was asked by the trial counsel prior to the
18 case being transferred to MDW; but even there when the government
19 talks about the trial counsel coordinating with Department of Defense
20 and Department of Justice in order to get these classification
21 reviews started, that process started right at the time period in
22 which they identified the alleged misconduct, in the July time
23 period. But then we have without any explanation, really no reason

1 for the immense amount of delay all the way to 18 March of 2011, and
2 then still when you would think that all this stuff would be done
3 because of the amount of time, we have an additional 8 months. And
4 the question now becomes, and this is why Coffman is relevant, the
5 government is producing Coffman, of ----

6 MJ: That would be Colonel Coffman?

7 CDC[MR. COOMBS]: Correct, Your Honor. Why Colonel Coffman is
8 relevant is approving these delays month after month over not only
9 our objection, our request for speedy trial, but also our request
10 that he do a more soul-searching requirement of the government to ask
11 for more specificity as to why the additional time is needed; why
12 hasn't this been done?

13 MJ: Well Colonel Coffman is coming as a witness; is that
14 correct?

15 CDC[MR. COOMBS]: That is correct, Your Honor, so I'm saying
16 that he can provide, I guess, whatever information that he was told,
17 but the real source of the information as to why this process was
18 held up rests with the OCAs, and apparently that may be one or more
19 individuals from each of the OCAs, depending upon who had the
20 responsibility; but contrary to what the government says, it is
21 relevant what another agency does, and if that other agency is not
22 diligent, the responsibility for that rests at the doorstep of the
23 trial counsel.

1 MJ: Well where -- what's the case law -- I saw the case law
2 that you cited saying that the government shouldn't have waited 76
3 days for the lab report to go forward with the -- or however many
4 days it was to go forward with the Article 32.

5 CDC[MR. COOMBS]: Right, Your Honor.

6 MJ: Would the real inquiry be if another agency is dithering,
7 what the government is doing about it, not necessarily that the other
8 agent -- agency is dithering?

9 CDC[MR. COOMBS]: Well the defense would point you to United
10 States v. Kuelker, I believe is how you'd say it; it's 20 M.J. 715.

11 MJ: Okay.

12 CDC[MR. COOMBS]: And there the court said the need to obtain
13 information from other agencies and other federal entities "is a
14 common problem" and specifically that "associated delay does not
15 qualify for exclusion" under Article 120.

16 MJ: Well that's with the Treasury checks, is that right, that
17 case?

18 CDC[MR. COOMBS]: Correct, Your Honor.

19 MJ: Okay.

20 CDC[MR. COOMBS]: And so by same analogy here, in a classified
21 evidence case, having OCAs and doing a classification review is a
22 common thing to have done; and as we argue in our motion, it's
23 understandable that's the -- that's the evidence that the government

1 wants to obtain, but if the time period was dragging on to the point
2 where they realized and even they realized it when they sent the
3 subsequent memorandums to the OCAs explaining to them, "Hey, look.
4 There's this thing called speedy trial, and if you don't hurry up, it
5 could have drastic implications to our case"; their words, in their
6 memorandums, in their enclosures. Now's the time for drastic
7 implications to their case because nothing was done and they
8 continued to let the OCAs take the amount of time, apparently, that
9 they wanted in order to complete these classification reviews. Other
10 avenues were available to the government. Much like the Pyburn case,
11 they didn't need to wait on the laboratory results. They could have
12 done other things. They could have just simply had a witness come
13 testify for the 32 that the information came from SIPRNet. SIPRNet's
14 a classified repository, basically, of information, and they could
15 have had a security expert testify that this information's
16 classified; that would have gotten them over their hurdle for the 32
17 and, you know, obviously if they needed to invoke a privilege, they
18 could bring an OCA witness to do that. The rule says affidavit but
19 it doesn't prohibit a witness to come in, in order to establish the
20 basis for a privilege under 505; or if they wanted the court to close
21 the proceedings, they could have, again, just either produced a
22 witness or just simply asked the court to take a look at the
23 information and the court would have the power under R.C.M. 806 to

1 close the proceedings based upon just looking at the information.
2 But what they -- the government shouldn't have done is just simply
3 say, "You know what? For our case to be the way we want it, we're
4 just going to wait until these classification reviews come in; and it
5 is what it is. The amount of time that it takes is the amount of
6 time it takes and therefore it's reasonable." So the only way that
7 we can actually get to whether or not that is correct is to actually
8 have somebody from each of the OCAs come testify. That would be the
9 pre-referral delay.

10 The post-referral delay involves HQDA, Department of
11 State, FBI, Department of Homeland Security, ONCIX, DIA, DISA,
12 CENTCOM, SOUTHCOM, CYBERCOM, Department of Justice, and the 57
13 agencies; and a lot of this is based upon the lengthy discovery that
14 we've had in this litigation that we've had in this case since
15 referral.

16 MJ: And this is discovery that the defense has moved to
17 compel, not discovery of the government's case in chief.

18 CDC[MR. COOMBS]: That is correct, Your Honor, but as the court
19 is aware, Article 10 and diligence applies even after the accused has
20 been arraigned, under Cooper; and in this instance, the diligence or
21 the lack of due diligence on the government's part was in result to
22 five very key misunderstandings by the government, which is not only
23 in our motion but has been the subject of extensive litigation. The

1 government believed initially that R.C.M. 701 did not apply in
2 classified information cases, and the court had to inform the
3 government that, no, unless you invoke a privilege, 701 does, in
4 fact, apply, so that obviously impacted the government's diligence in
5 obtaining discovery requested by the defense under 701(a)(2) and
6 701(a)(6). The government believed that it was not required to
7 disclose classified Brady information that was only material -- that
8 was material only to punishment; that was their belief. They didn't
9 have to disclose classified Brady information if it was only material
10 to punishment. Again, the court corrected the government, and that
11 also necessitated, then, asking for 45 to 60 more days in order to
12 coordinate and so that affected the time period of when we went to
13 trial.

14 The government then advanced certain theories that
15 discovery did not apply to draft damage assessments, and they went
16 under the Giles argument, and again that necessitated litigation and
17 time and again the government had to be corrected that draft damage
18 assessments would, in fact, be discoverable. The government argued
19 to the court that the FBI investigative file was not material to the
20 preparation of the defense, and the court correctly asked how could
21 it not be material to the preparation of the defense.

22 MJ: So is it the defense's position -- I mean normally the
23 rules talk about motions to compel discovery, you know, upon

1 referral, so the government can't argue any of this; they just have
2 to roll anytime you want something?

3 CDC[MR. COOMBS]: No, Your Honor. The issue then becomes -- and
4 this goes back to the Simmons case, which we cited, 2009 Westlaw
5 6835721. In the Simmons case, the trial counsel wrongly thought that
6 SOFA required it to go through Korea in order to determine whether or
7 not they had jurisdiction over a Soldier; and there you had a speedy
8 trial issue where the court correctly found that, look, just because
9 you were operating under a wrong view of the law and a negligent one
10 at that you don't get excused, and in this instance each one of
11 these, to include the one I haven't covered yet that the government
12 believed absent a specific request for information from the defense
13 it was not obligated to turn over material that was obviously
14 material to the preparation of the defense under R.C.M. 701(a)(2),
15 and the court had the very extensive discussion with Major Fein of
16 like, look, when you're looking at stuff, even if the defense doesn't
17 ask for it and you see something that's obviously material to the
18 preparation of the defense, are you going to hand that over? And it
19 took a while to finally get to the answer yes, but ----

20 MJ: Under the custody of military authorities.

21 CDC[MR. COOMBS]: Yes, Your Honor. But time and time again what
22 we see here is a incorrect application of either R.C.M. -- well
23 R.C.M.'s or M.R.E.'s in this case and that incorrect application had

1 implications on getting discovery, having them going through the
2 process of then getting authorization to provide that discovery, all
3 that time period that it took from the time of arraignment to now,
4 just getting discovery and we're now getting the last bit of that
5 discovery is directly attributable to the trial counsel not having a
6 correct understanding of the various rules that would be applicable
7 in a classified evidence case.

8 MJ: Now is it the defense's position that any discovery
9 requested by the defense should be prepositioned and ready to go
10 before referral, to include 505(g) reviews?

11 CDC[MR. COOMBS]: Well, no. The problem there -- and so using
12 that issue, if the government understood the rules correctly, that
13 701 would apply, or -- and therefore got the information that was
14 requested, if they wanted to use 505(g)(2) or if they wanted to
15 invoke a privilege, then as the gov -- as the defense has previously
16 argued, right after arraignment they would be prepared to tell the
17 court, look, based upon the discovery -- and it's not like we just
18 asked for it a month before arraignment; we were asking for a lot of
19 this stuff and eventually got the vast majority of it months, years
20 -- well, year, over a year in advance of arraignment. So if the
21 government was in the position where they knew exactly what would be
22 discoverable under the rules and then wanted to invoke M.R.E. 505,
23 they would have been prepared to do so, but oftentimes they were not

1 and that is clear because almost every time they had to say, look,
2 Your Honor, we need more time; we need additional time.

3 MJ: Well the court ruled against some of the defense
4 discovery; for example, the congressional hearing and all that. Were
5 they supposed to have that prepositioned and ready to go too?

6 CDC[MR. COOMBS]: Well there the -- again, the position there
7 was not that this was information that was not discoverable because
8 R.C.M. 701 didn't apply to classified evidence cases. There they
9 just had a position that, hey, that -- and rightfully so that this
10 was not in our possession; this is not 701(a)(2) and, you know,
11 they're not closely aligned, so they had a legitimate legal argument
12 there, but for the vast majority of the information, certainly all
13 the litigation on Department of State and FBI, none of that was in a
14 good faith type argument. I mean one of their arguments --
15 seriously, one of their arguments was because we have a damage
16 assessment, all the information, the 5,000 or so pages before that
17 damage assessment, must have been considered in the 50-page damage
18 assessment; therefore, it's cumulative. That was an argument that
19 was seriously made. And so when you look at the positions that the
20 government has taken, it has always been to prevent the discovery and
21 only after being required to produce it, but not to produce it
22 timely, to then have to ask for an additional 45 to 60 days in order

1 to coordinate and then review it and then produce it and then often
2 then having to go through the 505(g)(2) process.

3 MJ: So how are these witnesses going to help you that you
4 want?

5 CDC[MR. COOMBS]: Well each -- again, the -- and I won't go into
6 ----

7 MJ: Well first let me ask you have you tried to talk to any
8 of them.

9 CDC[MR. COOMBS]: Well a problem with the rest of these
10 witnesses is identifying who they would be.

11 MJ: Have you asked the government?

12 CDC[MR. COOMBS]: We have not asked the government, but the
13 government, at least with Department of State, prior to trying to get
14 any of this information, we've got several hurdles in front of us.
15 Apparently, Touhy requests, so we'd have to do a Touhy request; then
16 if we're asking about information that would be classified, we have
17 to know -- we have to indicate what that information is and then the
18 government would have to do some sort of classification review in
19 order to allow us to talk to the witness that we haven't been able to
20 identify.

21 MJ: So assuming I grant you these witnesses, are you going to
22 talk to them about classified information that we're going to have to

1 go through the process that you just described before a week from
2 Monday?

3 CDC[MR. COOMBS]: I hope that it's not classified information.
4 I don't know what they would consider would be classified
5 information. I would be asking, again, the ----

6 MJ: Well you have to tell them what classified information it
7 is; they don't have to be clairvoyant.

8 CDC[MR. COOMBS]: No, I don't know -- what I'm saying is what I
9 would be asking, Your Honor, I would not believe to be classified. I
10 don't know what they would believe to be classified; so if I'm asking
11 questions, such as when the government -- did the government ever ask
12 you to secure Brady information, ONCIX, I mean, that -- that in and
13 of itself is a long, sorted history of when did you have -- when did
14 you notify the government of the draft damage assessment? The -- if
15 you take a look at the government's response now, you've got a more
16 complete picture that really does undercut what was actually said
17 during the motions hearing. Time and time again what was said during
18 the motions hearing is we asked the question; they provided the
19 answer; they do not have a draft or final damage assessment; and then
20 we see that there's another three sentences to what was allegedly
21 said and there it's clear that they're working on the draft damage
22 assessment and only by the fact that we kept digging did we find out
23 that ONCIX even had anything. And now we find out, obviously, ONCIX

1 was tasked to do the government-wide damage assessment. So getting
2 witnesses from each of these agencies to answer some of the questions
3 would go back to whether or not the government was diligent.
4 Certainly, based upon the stories that we've gotten, HQDA is another
5 example of at least two or three different stories. So to a certain
6 extent we have to rely, obviously, on the government to identify who
7 they were working with that could answer these questions and then we
8 could assess whether or not the government was diligent.

9 **[Pause]** And for basically each of the other agencies, it
10 is the post-referral delay process, and again Article 10 would say
11 that they'd have to move forward with reasonable diligence at all
12 times and each of these witnesses, then, could answer the questions
13 of when the government contacted them; what the government asked; how
14 the government asked for it; what the government knew; why there was
15 a delay, especially with HQDA stuff of well over 9 months of the
16 government apparently not realizing that HQDA did not send
17 information responsive to what they asked. Now in the government's
18 response it makes it seem like they did know that earlier, but
19 instead of going directly to the source, HQDA, they went through the
20 OTJAG and the General Counsel, the Office of General Counsel, instead
21 of going directly to HQDA, even though they were told, hey, go
22 directly to HQDA to get this information.

23 **[Pause]**

1 MJ: The HQDA information, you already have the document
2 saying that they didn't provide it, so what's this witness going to
3 add?

4 CDC[MR. COOMBS]: Well the government in its response gives a
5 different timeline from the discovery that surrounded getting the
6 HQDA information. Now in their response they indicate they were --
7 they did realize that HQDA didn't receive something -- didn't respond
8 with the requested information, and then they started working -- they
9 diligently started working with the OTJAG and the Office of General
10 Counsel in order to get the information. Well HQDA will then be able
11 to kind of -- to testify as to what -- when they got the request,
12 when they -- did anyone from OTJAG or anyone from the Office of
13 General Counsel or trial counsel actually reach out to them at any
14 time between the date in which they were requested and 17 April, when
15 HQDA realized they didn't ----

16 MJ: If the government hasn't provided that information in
17 their attachments or any evidence of it, aren't you -- what -- have
18 they met their burden of proof? I mean why do you need the HQDA
19 witness?

20 CDC[MR. COOMBS]: Well they haven't, and in fact it's -- it is --
21 ---

22 MJ: Well ----

1 CDC[MR. COOMBS]: ---- no and I understand that logic, that it
2 is, in fact, interesting that the government wants to meet its burden
3 with essentially two witnesses; and the reason why that would be, and
4 the defense would say, is the -- they just want to be able to say
5 this is what it took; this is the amount of time it took. We're
6 telling you that that was reasonable. The convening authority
7 approved delay only to the amount that it was necessary and,
8 therefore, end of question. The 707 excludable delay was
9 appropriate. We have no speedy trial issue. We were reasonably
10 diligent.

11 MJ: Well we're beyond 707 now. We're talking -- we're after
12 arraignment, so this is where ----

13 CDC[MR. COOMBS]: Right; we'll I'm just saying in general, so
14 you're correct that with regards to ----

15 MJ: No, I mean with these witnesses that you're requesting
16 for Department of ----

17 CDC[MR. COOMBS]: Yeah, this is post-referral.

18 MJ: Yes.

19 CDC[MR. COOMBS]: So although it's post-referral but it deals
20 with pre-referral conduct, or lack thereof, because we're talking
21 about when they reached out to certain agencies, their
22 representations, what they knew at -- either at ONCIX or HQDA or
23 other agencies, so ----

1 MJ: Well I guess that's where I go back to why these
2 witnesses are necessary. If you have the entire government package
3 and there's nothing in there to indicate that they reached out, the
4 conclusion would be they didn't, right?

5 CDC[MR. COOMBS]: That is correct. So Your Honor is correct
6 that they would have that burden, but the concern of the defense is
7 the burdens by preponderance, a relatively low burden, and the
8 defense would believe that if we could get these witnesses, then
9 given the fact that we've received several different stories, and if
10 you just look at ONCIX alone, the various stories that we've received
11 from the government, every time changing slightly, that if we
12 actually had the witnesses come testify you would get to the ground
13 truth; and then far from supporting the government's position, it
14 would then demonstrate lack of diligence, which the defense at least
15 with 57 agencies, you have a couple different stories, either they
16 contacted them well before arraignment and knew that there was no
17 Brady information, which they represented to the court and defense at
18 arraignment, or they found out in February of 2012 that -- from ONCIX
19 that they needed to go to each of the agencies and then they tasked
20 one paralegal from their office to do so and then miraculously within
21 a month were able to get the various damage assessments. So even
22 with their explanation on ONCIX, it seems like they waited -- ONCIX
23 told them well over a year ago that we're not going to give you the

1 underlying documents, you need to go directly to the agencies, and
2 then from their chronology nothing. You have months and months go by
3 and then they go back to ONCIX and ask the exact same question
4 apparently and are told the exact same answer.

5 MJ: So if you have that information based on what the
6 government's already proffered, why do you need these witnesses?

7 CDC[MR. COOMBS]: Because none of their stories are consistent.
8 So, I mean, even -- and are ----

9 MJ: Well a proffer isn't proof. I mean, there's got to be
10 something to back the proffer up.

11 CDC[MR. COOMBS]: Correct, Your Honor.

12 MJ: So if there's nothing to back the proffer up, I guess
13 this is why I'm confused that all of these witnesses that you haven't
14 talked to are required to be produced?

15 CDC[MR. COOMBS]: Well, again, I haven't talked to them because
16 I don't know who they would be from the 57 agencies as far as they're
17 a relevant witness, but the ----

18 MJ: The government does; have you asked them?

19 CDC[MR. COOMBS]: Well I've asked -- I did in my witness
20 request, yes, produce a witness with knowledge.

21 MJ: No, no, no. I mean, someone for you to talk to, to tell
22 me what these people are going to say.

1 CDC[MR. COOMBS]: I have not asked them that question, no, Your
2 Honor.

3 MJ: Okay.

4 CDC[MR. COOMBS]: I've just asked them to produce a witness with
5 knowledge. So, yes, if they don't have any proof of it or don't
6 offer any proof of their diligence, then they have to rest on their
7 proffer, apparently; but the problem that the defense sees is that
8 burden of proof by preponderance is not the highest of burdens and
9 that's why we want to have the witnesses to come testify as to what
10 was done, especially when you do have inconsistent stories; and again
11 just comparing, well, ONCIX, the 57 agencies, and "QDA, three big
12 things that took a lot of time, each of those the government has told
13 various different stories and those stories are inconsistent at best.
14 And so by having somebody with knowledge from those agencies, which
15 we've asked previously, in support of the underlying motions to get
16 this documentation ----

17 MJ: How much Brady material did you get from these 63
18 agencies?

19 CDC[MR. COOMBS]: We got basically, again, the like two- to
20 three-page damage assessments from each of the agencies and ----

21 MJ: Each of the 63?

22 CDC[MR. COOMBS]: It was 57 apparently, and by my calculation at
23 one point we had 36 or so of the 57. We might have received

1 additional ones. We received quite a bit of discovery in the last
2 few weeks and have not -- I have not had the opportunity to go
3 through all of that, but at one point I believe it was 36 of the 57.
4 We thought it was initially 63, but the government's chronology says
5 or -- and their filing say 57.

6 MJ: All right, and I thought at one point it was 12 pages.

7 CDC[MR. COOMBS]: That was the initial -- the 12 pages that we
8 got of initial Brady material were for -- from a couple agencies;
9 that's the thread of information that we got in order to say ONCIX
10 must have something, because one of those said, you know, basically
11 in response to -- it was written to ONCIX, saying, "In response to
12 your request for this information, we reviewed it. We found no
13 damage," and so that was the thread that we pulled that to say ONCIX
14 has to have something, even though the government was saying time and
15 time again, "We ask the question. They tell us the answer. They
16 said they don't have any draft damage assessment." And, again, the
17 rest of that story, which [pause] -- which they cited was, "To date,
18 ONCIX has not produced any interim or final damage assessment in this
19 matter." That was all that they said, and then again now we know
20 from the response that the rest of the story says, "ONCIX is tasked
21 with preparing a damage assessment. However, that draft damage
22 assessment is currently a draft" -- again, what the court asked is
23 ONCIX have a draft -- "and is incomplete and continues to change as

1 information is compiled and analyzed." Clearly, then, at the time
2 that they were aware of this, which they were in advance of the
3 court's questions in March of this year, they knew that ONCIX had a
4 draft damage assessment in some form and the correct response then
5 would be to the court the full paragraph that's here. But again if
6 we just went with the first response we got from the government that
7 ONCIX has not produced any interim or final damage assessment, that
8 would have been the end of the story and we would never have gotten
9 the ONCIX damage assessment, so each of these other witnesses would
10 go to not only diligence for the Article 10 purposes, but even also
11 the representations that the government has made to the court for
12 time periods that predate the arraignment.

13 MJ: Well if you get a witness from ONCIX that will tell you
14 what the status of their assessments was and when they gave the
15 government what information, why do you need these 63 witnesses?

16 CDC[MR. COOMBS]: Well I guess if -- if, in fact, ONCIX, the
17 draft damage assessment at the time that they talked to them, ONCIX
18 had all the other 57 agencies, that would cover ----

19 MJ: Well if they said, "We told the government that we
20 couldn't give them permission to do this. They had to go back to
21 these other 57 agencies, and our records say it was on such and such
22 date," why do you need these other 57 agencies?

1 CDC[MR. COOMBS]: Well I -- to make sure I understand the
2 question, the government has already in their chronology given dates
3 in which ONCIX told them that information on two separate occasions
4 with a span, I believe, of about 9 months when they went back to get
5 the same question. The question that the 57 agencies would answer
6 that ONCIX couldn't is: Did the government contact them in February
7 of 2012, where it appears that they say, "Hey, for the first time we
8 were made aware that we had to go directly to the agencies and we
9 came up with this task a paralegal to get the information and that
10 paralegal was successful within a month" or was it earlier because in
11 another portion they say that in November of ----

12 MJ: Where is that, "in November"?

13 CDC[MR. COOMBS]: That's within their motion. I'm not for sure
14 of the exact location. The government may be able to say, but
15 November 2011 they indicated that they started to do the research and
16 reaching out to the various agencies, and that I think is what
17 they're saying under ----

18 MJ: So it's a 3-month difference then, November, ----

19 CDC[MR. COOMBS]: Right.

20 MJ: ---- December, January, February.

21 CDC[MR. COOMBS]: Right, and that -- and that position, then,
22 supported apparently the representation that's been made to the court
23 and what the court had found in one of its rulings that the

1 government has engaged in extensive searching to try to obtain Brady
2 information. The government has said at that point they had even
3 gone to the Department of Agriculture to try to get the information,
4 so I think, again, it's unclear whether or not it's February of 2012
5 or November of 2011 that they start reaching out to these agencies.

6 MJ: And what's the big difference in the 3 months? Now,
7 granted, it's 3 months.

8 CDC[MR. COOMBS]: Right, 90 days, I mean, so that would be -- I
9 mean, there are many cases where 90 days alone there's an Article 10
10 violation, and you're three-fourths of the way to speedy trial just
11 on that issue. So, again, the way the defense views this is this
12 information, then, would get to the ground truth unless the
13 government has another story that they want to offer on ONCIX, HQDA,
14 and the 57 agencies, but it appears that and our -- that's why the
15 reply was important because there are so many facts that are involved
16 in each of these things that you only can keep them straight by
17 putting them on paper and then looking at it and so that's why we
18 wanted you to look at the reply.

19 MJ: I understand that, yes; okay.

20 CDC[MR. COOMBS]: So subject to your questions, ma'am.

21 MJ: I just asked them; thank you.

22 CDC[MR. COOMBS]: Thank you.

1 MJ: Do we need a recess before we begin the government or are
2 you ready to go?

3 TC[MAJ FEIN]: May we recess, Your Honor?

4 MJ: How long?

5 TC[MAJ FEIN]: Fifteen minutes.

6 MJ: Court is in recess.

7 **[The Article 39(a) session recessed at 1525, 18 October 2012.]**

8 **[The Article 39(a) session was called to order at 1542, 18 October**
9 **2012.]**

10 MJ: This Article 39(a) session is called to order. Let the
11 record reflect all parties present when the court last recessed are
12 again present in court except Captain Morrow is no longer present for
13 the government.

14 All right, Major Fein?

15 TC[MAJ FEIN]: Your Honor, may it please the court. May I brief
16 from the table?

17 MJ: Yes.

18 TC[MAJ FEIN]: Your Honor, overall -- well, first, this is --
19 this is not -- we're not here to litigate speedy trial. We're here
20 to just litigate the witnesses the defense has requested as part of
21 its evidentiary motion to compel for speedy trial, but a few points.
22 First off, it might be easier just to go each witness through there,
23 but overall the defense seems to want to keep the focus of the speedy

1 trial litigation and thus these witnesses that they're requesting or
2 individuals to be named as witnesses about classification review in
3 discovery that was part of litigation and only about that, where
4 speedy trial is much greater than those two issues, so understanding
5 that's what's going to be litigated next time but most of these
6 witnesses don't -- the government's position are -- is aren't
7 relevant for speedy trial, either 707 or Article 10 diligence.

8 MJ: I understand that that's the government's position, but
9 the defense -- so the government's position is even if there are
10 issues with these two pieces, the pie is bigger.

11 TC[MAJ FEIN]: Yes, Your Honor, but we also have to litigate the
12 pieces as well, so ----

13 MJ: I understand that.

14 TC[MAJ FEIN]: ---- of course that's why we're here today, but
15 for speedy trial, once we get there in 2 weeks, yes, it's a very
16 large pie that's involved in this case, and these are just two
17 issues. And even the reason if you look at the request, Enclosure 11
18 to the government's reply to speedy trial, the request the government
19 submitted to the convening authority not *ex parte* with the defense
20 cc'd on it lists a litany of reasons that weren't just classification
21 reviews. Now the government's not trying to ----

22 MJ: And you're talking about for what?

INSTRUCTIONS FOR PREPARING AND ARRANGING RECORD OF TRIAL

USE OF FORM - Use this form and MCM, 1984, Appendix 14, will be used by the trial counsel and the reporter as a guide to the preparation of the record of trial in general and special court-martial cases in which a verbatim record is prepared. Air Force uses this form and departmental instructions as a guide to the preparation of the record of trial in general and special court-martial cases in which a summarized record is authorized.

Army and Navy use DD Form 491 for records of trial in general and special court-martial cases in which a summarized record is authorized. Inapplicable words of the printed text will be deleted.

COPIES - See MCM, 1984, RCM 1103(g). The convening authority may direct the preparation of additional copies.

ARRANGEMENT - When forwarded to the appropriate Judge Advocate General or for judge advocate review pursuant to Article 64(a), the record will be arranged and bound with allied papers in the sequence indicated below. Trial counsel is responsible for arranging the record as indicated, except that items 6, 7, and 15e will be inserted by the convening or reviewing authority, as appropriate, and items 10 and 14 will be inserted by either trial counsel or the convening or reviewing authority, whichever has custody of them.

1. Front cover and inside front cover (chronology sheet) of DD Form 490.
2. Judge advocate's review pursuant to Article 64(a), if any.
3. Request of accused for appellate defense counsel, or waiver/withdrawal of appellate rights, if applicable.
4. Briefs of counsel submitted after trial, if any (Article 38(c)).
5. DD Form 494, "Court-Martial Data Sheet."
6. Court-martial orders promulgating the result of trial as to each accused, in 10 copies when the record is verbatim and in 4 copies when it is summarized.
7. When required, signed recommendation of staff judge advocate or legal officer, in duplicate, together with all clemency papers, including clemency recommendations by court members.

8. Matters submitted by the accused pursuant to Article 60 (MCM, 1984, RCM 1105).

9. DD Form 458, "Charge Sheet" (unless included at the point of arraignment in the record).

10. Congressional inquiries and replies, if any.

11. DD Form 457, "Investigating Officer's Report," pursuant to Article 32, if such investigation was conducted, followed by any other papers which accompanied the charges when referred for trial, unless included in the record of trial proper.

12. Advice of staff judge advocate or legal officer, when prepared pursuant to Article 34 or otherwise.

13. Requests by counsel and action of the convening authority taken thereon (e.g., requests concerning delay, witnesses and depositions).

14. Records of former trials.

15. Record of trial in the following order:

- a. Errata sheet, if any.
- b. Index sheet with reverse side containing receipt of accused or defense counsel for copy of record or certificate in lieu of receipt.
- c. Record of proceedings in court, including Article 39(a) sessions, if any.
- d. Authentication sheet, followed by certificate of correction, if any.
- e. Action of convening authority and, if appropriate, action of officer exercising general court-martial jurisdiction.
- f. Exhibits admitted in evidence.
- g. Exhibits not received in evidence. The page of the record of trial where each exhibit was offered and rejected will be noted on the front of each exhibit.
- h. Appellate exhibits, such as proposed instructions, written offers of proof or preliminary evidence (real or documentary), and briefs of counsel submitted at trial.